(24,893)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 229.

STANLEY MEISUKAS, PLAINTIFF IN ERROR,

vs.

GREENOUGH RED ASH COAL COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1916.

1 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of New York, Greeting:

Because, in the record and proceedings, as also in the making of an order which is in the District Court before you or some of you, between Stanley Meisukas, Plaintiff-in-Error and Greenough Red Ash Coal Company, Defendant-in-Error, a manifest error hath happened to the great damage and injustice of the said Stanley Meisukas, as is said and appears by his complaint, We, being willing that such error, if any hath been, to be duly corrected and fully and speedy justice done to the parties aforesaid in the behalf, Do Command You, that under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Supreme Court, at the City of Washington, D. C., together with this Writ, so that you have the same in the said Supreme Court at Washington, D. C., within thirty days from the date hereof; that the records and proceedings aforesaid be inspected, the said United States Supreme Court cause further to be done therein to correct that error, what of right and according to the laws, treaties, customs and constitution of the United States ought to be done.

Witness, The Honorable Thomas I. Chatfield, Judge of the District Court, United States, this 28th day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and fortieth.

[SEAL.]

PERCY B. GILKES,
Clerk of the District Court of the United States of America for the Eastern District of New York,

By J. G. COCHRAN, *Deputy Clerk.*

2 The foregoing writ is hereby allowed.

THOMAS I. CHATFIELD,
U. S. D. J.

3 [Endorsed:] L. 5-44. United States District Court, Eastern District of New York. L. 5-34. Stanley Meisukas, Plaintiff-in-error, against Greenough Red Ash Coal Co., Defendant-in-error. Copy Writ of error. Pd. 20c. Baltrus S. Yankaus, Attorney for Plaintiff-in-error, 154 Nassau Street, Borough of Manhattan, New York City. Filed July 29, 1915.

4 STATE OF NEW YORK,
City of New York,
County of New York, ss:

William Schaaf being duly sworn says that he is over the age of twenty-one years. That on the 28th day of July, 1915, he served a copy of the annexed writ of error with notice of filing and entry thereof, upon the defendant and defendant-in-error, the Greenough Red Ash Coal Co., and upon Alexander & Green, Esqs., the attorneys for the said Company by depositing the same properly enclosed in a post paid wrapper in the general post office regularly maintained by the Government of the United States, in the City of New York, Borough of Manhattan, State of New York, directed to Alexander & Green, Esqs., at No. 120 Broadway, Borough of Manhattan, City of New York, said address being that designated by them for that purpose upon the preceding papers in this action.

(Sgd.) WILLIAM SCHAAF.

Sworn to before me this 29th day of July, 1915.

EDWARD T. HART, JR.

[SEAL.] *Notary Public, Bronx County No.* 61.

Certificate filed in N. Y. Co. No. 373; New York County Register's No. 7311.

5 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

Plaintiff complains of the Defendant by Baltrus S. Yankaus, his Attorney respectfully shows to this court and alleges upon information and belief:

I. That at the time of commencement of this action, the Plaintiff was and is now a citizen of the State of New York, and resident of Eastern District of New York.

II. The Plaintiff further alleges upon information and belief, that at all of the times hereinafter mentioned, the Defendant was and is a foreign corporation duly organized and existing under and by virtue of the Laws of the State of Pennsylvania and having its principal place of business at Shamokin of said State and resident and Citizen of Middle District of Pennsylvania.

III. That at all of the times hereinafter mentioned and at the time of commencement of this action, the Defendant did and still does business within the State of New York.

IV. That at all of the times hereinafter mentioned, the Defendant did and still does own property within the State of New York.

V. That at all of the times hereinafter mentioned and more

6 particularly at the time of happening of the accident hereinafter described, the Defendant owned, operated, managed, and controlled Greenough Colliery, near Shamokin, in Northumberland County, in the State of Pennsylvania, and mined and prepared Anthracite Coal and employed more than ten (10) persons in said Colliery or Mine.

VI. That at all of the times hereinafter stated, the Defendant retained, reserved and maintained to itself the care, control, maintenance and operation of its said Mine, and Colliery and of all the parts and portions thereof and of all rules, ways, means, works, machinery, and was in charge of all instrumentalities in connection of operation and performance of mining Anthracite Coal in said Colliery.

VII. That at all of the times hereinafter stated, the Defendant supervised, directed and controlled and prosecution and performance of the work in its said Mine and Colliery as well as all of its employees, vice-principals, managers, mining-foremen, and employees of others and all other persons lawfully in and upon, and persons employed and engaged at work therein, including the Plaintiff, and those employed, and engaged at work therein, authorized and empowered and permitted by the Defendant to hire and employ persons to work in its said Mine or Colliery and to direct, control, and command such persons and maintain to itself its rights to employ them and discharge any or all of them including the Plaintiff.

VIII. That on or about the 8th day of May 1913, and at the time of happening of the accident as hereinafter stated, the Plaintiff was employed by the Defendant in said Colliery or Mine.

IX. That on or about the 8th day of May 1913 while the Plaintiff was employed and at the time of the accident hereinafter stated, the Plaintiff under the directions, instructions and in obedience of

7 ways, means and customs, used, allowed and permitted by the Defendant, the Plaintiff was preparing a charge of dynamite for the purpose to blast and excavate coal and rocks in the Defendant's said Mine and Colliery, said charge of dynamite exploded and went off unexpectedly without any negligence on the part of the Plaintiff, and without any knowledge of a danger to said Plaintiff and caused this Plaintiff to sustain, severe, serious and permanent injuries, and caused the loss of both arms, one of his eyes was totally destroyed, the other was partially, and Plaintiff became nearly totally and permanently blind, and permanently became and remain so, in disabled condition and incapable to take care of himself and will remain so permanently, and his hearing was destroyed, ear drums were ruptured, suffering from neurasthenia tromatic neurosis, and caused this Plaintiff to suffer great pain, inconvenience, and on information and belief that he will continue to suffer said pain permanently.

X. That the said accident and injuries to this Plaintiff were due solely to the carelessness and negligence of the Defendant, its vice-principals, superintendents, managers, representatives and persons in charge of works, ways means and machinery and in charge of

necessary rules and in charge of a use of tools, machinery, explosives and instrumentalities which were necessary to be used for operation and performance of the work which the Plaintiff had to perform, and said injuries were caused through negligence of said Defendant and without any negligence on the part of the Plaintiff.

XI. The Defendant was careless and negligent, in that, that the Defendant, its vice-principals, superintendents, agents, representatives ond persons in charge of works, ways, means and machinery and in charge of exercise of skill and care directed, in-
8 structed, caused, permitted and allowed this Plaintiff to use and apply instruments and tools and appliances and necessary parts in connection therewith which was necessary to be used to combine such charge for the purpose to blast dangerous, unsafe, unfit, improper, and with lack of skill and care which were necessary to use and to be used in preventing the causes of accidents, injuries and distruction of lives of persons working in said Colliery or Mine, and including the Plaintiff and failed to take proper steps, use the exercise of skill and care so to prevent such accidents and injuries.

XII. The Defendant is careless and negligent in that, that the Defendant, its vice-principals, agents, superintendents, representatives and persons in charge of ways, means, works and machinery failed to furnish proper, sufficient and necessary tools, appliances and instrumentalities to this Plaintiff and failed to warn him of the danger so that the Plaintiff would have reasonable knowledge how to avoid the danger and injuries as above stated.

XIII. The Defendant was careless and negligent, in that, that the Defendant, its vice-principals, superintendents, agents, representatives and persons in charge of ways, means works, machinery and in charge of exercise of skill and care, failed to investigate properly the performance and operation and the use of dynamite, blast and its parts in connection which is used for the purpose to blast and excavate to discover, disclose and see how the work was done and in that, that it should have used the proper, exercise of skill and care in looking, discovering, and disclosing such dangers and have the same removed and remedied and make the working places safe and fit to work and including the place where the Plaintiff was at work.

9 XIV. The Defendant was careless and negligent, in that, that the Defendant, its vice-principals, superintendents, foremen, managers, agents, representatives and persons in charge of ways, works, means and machinery to make and promulgate proper rules and see that such rules should be enforced which were necessary in having such work performed in a reasonable safe way and manner by the Plaintiff and its employees and contrary allowed and permitted and caused to have such work and operation performed in dangerous, unskilful, unsafe and without exercise of skill and care so to prevent the injuries to the Plaintiff and persons employed and engaged in said Mine and Colliery, including the Plaintiff.

XV. The Defendant was careless and negligent, in that, that

the Defendant, its vice-principals, superintendents agents, representatives and persons in charge of ways, works, means and machinery failed to properly post proper and necessary rules, instructions in writing and printed form and properly frame and failed to keep, and failed to cause, to be kept and to have such rules posted, hung, or tightened to structures or other convenient appliances at, near and about the entrance of said Mine and Colliery, and have them posted in necessary places according to Anthracite Mining Law and according to the duties of a Master which he owes to his servants and its employees, and persons engaged in performance of the Defendant's work, so that the Plaintiff and employees of the Defendant be able to read and have full knowledge of its existence and its force and enable them to avoid dangers, unsafe, unfit and improper ways to perform, and have performed as it was necessary in their employment and at their works and including the place where the Plaintiff was engaged at work.

10 XVI. The Defendant was careless and negligent, in that, that it allowed and permitted its vice-principals, superintendents, managers, mining-foremen and persons in charge of works, ways, means and machinery to supervise, manage and control the work and operation in said Mine and Colliery in dangerous and unsafe manner and with lack of exercise of skill and care and without making proper and necessary rules and while they failed to see that rules were enforced which was necessary for operation and performance of the work that the Plaintiff had to perform and to keep such works, ways and means in reasonable safe way and manner and to prevent unnecessary dangers which may cause accidents and injury to its employee- and men working in said Mine, including the Plaintiff.

XVII. The Defendant was careless and negligent, in that, that it employed incompetent, unfit, unskilfull and dangerous vice-principals, superintendents, managers, mining-foremen and persons in charge of works, ways, means and machinery and allowed them to perform blasting and excavating coal and preparing charges of dynamite using dangerous, unfit and improper instruments in connection therewith and supervising such work without making, posting, and properly delivering necessary rules and ways, and means, including the place and the work where Plaintiff was at, to perform under their direction, instructions and with their permission and through such failure the injuries were caused to the Plaintiff, whereby the Defendant by using of exercise of skill and care could have removed the danger and prevent- injury to the Plaintiff.

XVIII. The Defendant was careless and negligent, in that, that it failed to inspect, locate and discover the dangers which were existing at the time of the Plaintiff's accident under the supervision and control of unskilfull incompetent, unfit and being of lack of exercise of skill and care mining-foremen, vice-principals,

11 superintendents, and persons in charge of ways, works, means and machinery and failed to remove and discharge such persons and employ and replace competent, skilfull and capable of exercise of skill and care which was necessary to perform the De-

fendant's work by the Plaintiff and his co-workingmen and prevent injuries to the Plaintiff and the Defendant's Employees at said Colliery or Mine.

XIX. The Defendant was careless and negligent, in that, that it knowingly and should have known that such management and supervision of the works in its mine was unsafe, improper and dangerous and was operated without furnishing proper tools, instruments and articles to handle and prepare dynamite and explosive parts which composes *a* charge for the purpose to be used for excavating and blasting coal and rock in said Mine or Colliery and through such failure the injuries *was* caused to the Plaintiff at the time of the accident.

XX. That the work, then being prosecuted by the Defendant in its said Coal Mine and Colliery and which the Plaintiff was engaged, was under circumstances existing in the said coal mine and colliery attended with great danger to the working men engaged therein, including the Plaintiff, by reason whereof became and was necessary for the Defendant as its duty and of the Defendant's Vice-Principals, Superintendents and persons in charge of its ways, means, works, machinery and plant and the work in which the Plaintiff was engaged and entrusted with the authority to direct, control and command the Plaintiff to make, adopt, promulgate, enforce and to see that they were enforced, proper, sufficient and necessary rules, and regulations for the conduct, operation and maintenance of the said Mine and Colliery and the performance of the work therein, and the preparation, charging and exploding of dy-
12 namite and *and* other explosives and the manipulation used *and* handling thereof; but that they failed and omitted to make, adopt, promulgate and enforce such rules, and regulations and wholly disregarded their duty in the premises, in violation of Anthracite Mining Law of the State of Pennsylvania and the duty which the Defendant owned as a duty of master to its servant.

XXI. The Defendant, is careless and negligent in that, that it employed, retained and caused to be and remain in its employment unfit, careless and dangerous, and lack of exercise of skill and care, the mining-foremen and persons that had charge and control over the Plaintiff and while they were empowered by the Defendant to inspect, direct and to use dangerous tools and instruments and directed the Plaintiff to use the same, and to use unsafe, improper ways and means of mining coal in its Colliery and allowed them to operate, manage and supervise said works without using proper tools and instruments and allowing them to give and deliver improper and unsafe necessary ways and means to the Plaintiff for the purpose to make the working places reasonably safe and for the purpose of handling and preparing dynamite charge or explosives which is used for the purpose to blast and excavate coal and rocks and the Defendant failed to discharge and remove such mining-foremen and persons in charge and replace them with competent, skilfull and capable of exercise of skill and care, to prevent the injuries to the Plaintiff and see that the accidents and dangers should be removed and the Defendant failed to cause to have such operation

and performance of such work and in said colliery reasonably and properly safe and allowed and permitted the mining-foremen and persons in charge of works ways and machinery to violate and disregard Anthracite Mining Laws of the State of Pennsylvania which
were existed and been in force at the time of the accident
13 and which — hereinafter alleged.

XXII. That in and by a certain Act and Law of the State of Pennsylvania approved the 2nd day of June, 1891, and in full force and effect at the time of the happening of said accident entitled "An act to provide for the health and safety of persons employed in and about the anthracite coal mine- of Pennsylvania and for the protection and preservation of property connected therewith." It was provided and enacted among other things in Articles XII thereof as follows:

Rule 29. When high explosives other than gunpowder are used in any mine, the manner of storing, keeping, moving, charging and firing or in any manner using such explosives, shall be in accordance with special rules as furnished by the manufacturers of the same. The said rules shall be endorsed with his or their official signature and shall be approved by the owner, operator or superintendent of the mine in which such explosives are used.

Rule 30. In charging holes for blasting in slate or rock in any mine, no iron or steelpointed needle shall be used and a tight cartridge shall not be rammed into a hole in coal, slate or rock with an iron or steel tamping bar, unless the end of the tamping bar is tipped with at least six (6) inches of copper or other soft metal.

Rule 31. A charge of powder or any other explosive in slate or rock which has missed fire shall not be withdrawn or the hole reopened.

Rule 32. A minor or other person who is about to explode a blast by the use of patent of other squibs or matches, shall not shorten the match, nor saturate it with mineral oil, nor turn it down when placed in the hole, nor ignite it except at its extreme end, nor do anything tending to shorten the time the match will burn.

Rule 33. When a workman is about to fire a blast he shall be careful to notify all persons who may be in danger therefrom, and shall give sufficient alarm before and after igniting the match so that any person or persons who may be approaching shall be warned of the danger.

Rule 34. Before commencing work and also after the firing of every blast, the miner working a breast or any other place in a mine,
shall enter such breast or place to examine and ascertain its
14 condition, and his laborer or assistant shall not go to the
fact of such breast or place until the miner has examined the same and found it to be safe.

Rule 36. A person who is not a practical miner shall not charge or fire a blast in the absence of an experienced miner, unless he has given satisfactory evidence of his ability to do so with safety and has obtained permission from the mine foreman or person in charge.

Rule 37. An accumulation of gas in mines shall not be removed by brushing where it is practicable to remove it by brattice.

Rule 54. For the purpose of making known the rules and the provisions of this act to all persons employed in or about such mine or colliery to which this act applied, an abstract of the act and rules shall be posted up in legible characters in some conspicuous place or places at or near the mine or colliery where they may be conveniently read by the persons employed, and so often as the same become obliterated or destroyed the owner, operator or superintendent shall cause them to be renewed with all reasonable dispatch. Any person who pulls down injures or defaces such abstract of the act or rules when posted up in pursuance of the provisions of this act, shall be guilty of an offense against this act.

XXIII. And it was further enacted by Article XVII. Section 8, and in full force and effect at the time of happening of the accident among other things as follows:

Section 8. That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained.

XXIV. The Defendant is further negligent in that, that the Defendant, its Vice-Principals, Superintendents, Representatives and Persons in charge and control of ways, means, works and machinery, that they employed the Plaintiff for the purpose to handle dynamite and compose a charge out of explosive parts for the purpose to blast and explode coal and rocks without possessing, leaving and having registered with the employer proper Miner's Certificate, in accordance and requirements of Anthracite Mining Laws of the State of Pennsylvania and in violation, disobedience and disregard of such laws as herein stated, the Defendant, its Vice-Principals, superintendents, agents, representatives, and persons in charge as herein stated in this paragraph and in violation of the laws alleged in this complaint, negligently and carelessly employed, directed, instructed, allowed, permitted and required this Plaintiff to use, handle and prepare dynamite, explosives, and charges for the purpose to blast and excavate coal and rocks in said colliery and the Defendant's Mine and through such violation, disobedience and disregard of said laws by the Defendant and its said Agents caused the injury to the Plaintiff as herein alleged.

XXV. That in and by a certain act and law which is known as Anthracite Mining Law of the State of Pennsylvania, and being in full force and effect at the time of happening of the accident hereinbefore stated, approved the 15th day of July 1897 among other things reads as follows:

To protect the lives and limbs of miners from the dangers resulting from incompetent miners working in the anthracite coal

mines of this Commonwealth, and to provide for the examination of persons seeking employment as miners in the anthracite region, and to prevent the employment of incompetent persons as miners in anthracite coal mines, and providing penalties for a violation of the same.

Section 1. Be it enacted, &c., That hereafter no person whosoever shall be employed or engaged in the anthracite coal region of this Commonwealth, as a miner in any anthracite coal mine, without having obtained a certificate of competency and qualification so to do from the "Miners' Examining Board" of the proper district, and having been duly registered as herein provided.

Section 6. That no person shall hereafter engage as a miner in any anthracite coal mine without having obtained such certificate as aforesaid. And no person shall employ any person as a miner who does not hold such certificate as aforesaid, and no mine foreman or superintendent shall permit or suffer any person to be employed under him, or in the mines under his charge and supervision as a miner, who does not hold such certificate. Any person or persons who shall violate or fail to comply with the provisions of this act, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not less than one hundred dollars and not to exceed five hundred dollars, or shall undergo imprisonment for a term not less than thirty days and not to exceed six months, or either, or both, at the discretion of the court.

XXVI. A further act and law of the State of Pennsylvania was in full force and effect at the time of happening of the accident which was approved the 29th day of May 1901 among other things reads as follows:

Relating to anthracite mines, and providing for the care and life and attention of employes injured in and about said mines.

Section 7. The term "coal mine," as herein used, includes the shafts, slopes, drifts or inclined planes, connected with the excavations penetrating coal stratum or strata, which excavations are ventilated by one general air current, or division thereof, and connected by one general system of mine railroads, over which coal may be delivered to one or more parts outside the mine. The term "mine foreman" means the person who shall have, on behalf of the operators, immediate supervision of a coal mine. The term "operator" means any firm, corporation or individual operating any coal mine. The term "anthracite mine" shall include any coal mine not now included in the bituminous boundaries.

XXVII. That the Defendant, its Vice-Principals, Superintendents, Managers, Foremen, Representatives, Agents, and the persons in charge of the work and the place where the Plaintiff was engaged at work and entrusted with the authority to direct, control and command the Plaintiff, carelessly and negligently and in violation of the provisions and requirements aforesaid, of such acts and laws used and employed in the said mine and colliery, iron or steel pointed needles to be used in making holes through sticks of dynamite in charging of holes for blasting and in every way wholly

failed and omitted to comply with said acts and laws in each of its said requirements and provisions.

17 XXVIII. That in and by a further act and law of said State of Pennsylvania, approved the 10th day of June, 1907, and in full force and effect at the time of the happening of the accident, entitled, "An act extending and defining the liability of employers, in actions for negligence, injury or death of their employes; declaring what shall not be a defense in such actions against their employers, and defining who are agents of the employers, under this act.

Section 1. Be it enacted, &c., That at all actions brought to recover from an employer for injury suffered by his employe, the negligence of a fellow-servant of the employe shall not be a defense, where the injury was caused or contributed to by any of the following causes; namely:—

Any defect in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman or any other person in charge or control of the works, plant or machinery; the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death; the negligence of any person to whose orders the employe was bound to conform, and did conform, and by reason of his having conformed thereto, the injury or death resulted; the act of any fellow-servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

Section 2. The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employes.

Section 3. All acts or parts of acts inconsistent herewith be and the same are hereby repealed.

XXIX. That solely by reason of the carelessness and negligence of the Defendant, its Vice-Principals, Superintendents, Managers, Foremen, Representatives and the Person in charge of the work, and the place where the Plaintiff was engaged at work, and entrusted with authority to direct, control and command the Plaintiff, the Plaintiff sustained severe, serious and permanent injuries,

18 including the loss of both arms and hands, below the elbows, loss of his right eye, which was blown out, and injury to his left eye, the sight of which has become impaired and effected by the accident; his sight has almost been destroyed and injuries to both ears, which have almost destroyed his hearing; and as he is informed and verily believes he will ultimately loose the sight of his left eye entirely and become completely deaf; and he was otherwise injured and sustained severe, and serious injuries to his nerves anl nervous system and he was rendered sick, sore and disabled and so continues and will permanently so remain and be suffered and suffers and will permanently suffer great physical and mental pain; and he was confined to bed and to his home and still has

and will permanently be at times so confined and compelled to undergo medical and surgical treatment in endeavoring to be cured of his injuries and in order to alleviate his pain and suffering; and he has been compelled and will hereafter permanently be compelled to expend large sums of money for such treatment and for medicines and as he is informed and verily believes he will require the services of nurses or attendants in and about such treatment and be compelled to expend large sums of money therefor; and that ever since the happening of the said accident he has been, still is and will permanently be incapacitated and disabled from doing any work or earning any moneys; and he has been, still is, and will permanently be compelled to hire persons to help assist take care of and attend him at great cost and expense to him for such services and such persons; all to his damage in the sum of One Hundred and Fifty Thousand Dollars ($150,000.00).

Wherefore, plaintiff demands judgment against the defendant for the sum of One Hundred and Fifty Thousand Dollars, ($150,000.00), besides the costs and disbursements of this action.

BALTRUS S. YANKAUS,
Attorney for Plaintiff.

154 Nassau Street, Borough of Manhattan, New York.

19 STATE OF NEW YORK,
City of New York,
County of New York, ss:

Stanley Meisukas, being duly sworn, deposes and says that he is the plaintiff in the within entitled action; that he has heard read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

His
STANLEY x MEISUKAS,
mark

Sworn to before — this 22nd day of April, 1915.

[Seal Morris Blau, Notary Public, New York County.]

MORRIS BLAU,
Notary Public, New York County.

19½ [Endorsed:] 534. L. 5-44. U. S. District Court, Eastern District of New York. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendant. (Original.) Summons & Complaint. Baltrus S. Yankaus, Attorney for Plaintiff, 154 Nassau Street, Borough of Manhattan, New York City. Filed April 23, 1915.

20 United States District Court, for the Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

To the Above-named Defendant:

You are hereby summoned to answer the complaint in this action, and file your answer and serve a copy thereof on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service: and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Thomas I. Chatfield and Van Vechten Veeder, Judges of the District Court of the United States for the Eastern District of New York, at the Borough of Brooklyn, this 23rd day of April, in the year one thousand nine hundred and fifteen.

[Seal District Court of the United States, Eastern District of New York.]

[L. S.] PERCY G. B. GILKES, *Clerk*,
By JAMES L. O'NEIL, *Deputy Clerk*.

BALTRUS S. YANKAUS, *Plaintiff's Attorneys*.

Office and Post Office Address 154 Nassau Street, Borough of Manhattan, New York City, New York.

[Endorsed:] 534. L. 5-44. United States District Court, Eastern District of New York. Stanley Meisukas, Plaintiff, vs. Greenough Red Ash Coal Co., Defendant. Summons. Baltrus S. Yankaus, Plaintiff's Attorney. Filed May 26, 1915.

21 In the United States District Court for the Eastern District of New York, at Brooklyn, N. Y., May 26, 1915.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

Present, Thomas I. Chatfield, *U. S. D. J.*

An order having been made this 26th day of May, 1915, upon a special appearance by the defendant, directing the plaintiff or his attorney to show cause why the summons and the attempted service of the summons herein should not be set aside and declared null, void and ineffective, and the plaintiff having applied for an adjournment of the hearing upon the said order to show cause;

it is upon the said petition and order to show cause and the complaint

Ordered that such hearing upon said order to show cause be and the same hereby is adjourned to the 9th day of June, 1915, at two o'clock in the afternoon of that day at the same time and place as stated in said order to show cause; and it is further

Ordered that as a condition to such adjournment the time of the defendant to appear generally herein and answer, plead or otherwise move if it be so advised be and the same hereby is extended until ten days after the service upon its attorneys, who have appeared specially herein for it, of a copy of such order as may be made upon the determination of this motion with notice of entry thereof, and that such extension hereby granted shall be without prejudice to the rights of the defendant in the premises, and it is further

22 Ordered that the plaintiff within six days file an amendment or amended complaint showing whether the plaintiff is an alien or a citizen of the U. S. and if a citizen whether native born or naturalized and the date and place of such naturalization, if any.

THOMAS I. CHATFIELD,
U. S. D. J.

[Endorsed:] L. 5-44. United States District Court for the Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendant. Pd. 10¢. Order. Alexander & Green, 120 Broadway, Borough of Manhattan, New York City, N. Y., Attorneys for Defendant, appearing specially for the sole and single purpose of the motion to set aside the service of the summons. Filed and entered May 26, 1915.

23 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

On reading the summons and complaint in this action and the affidavit of Michael W. O'Boyle, verified the 26th day of May, 1915, and on motion of Alexander & Green, appearing specially herein for the defendant for the sole and single purpose of objecting to the jurisdiction of this Court over the defendant in this action and of making this motion to set aside and declare null, void and of no effect the attempted service of the summons herein, together with a copy of the complaint, upon the defendant herein,

I do hereby order the plaintiff herein or his attorney to show cause before this Court at a Term of this Court for the hearing of motions, to be held at the United States Court House and Post Office Building, in the Borough of Brooklyn, City of New York, on the 26th day of May, 1915, at two o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why the

summons and the attempted service of the summons herein, made by delivering a copy thereof, together with a copy of the complaint to the said Michael W. O'Boyle, as stated in said affidavit, should not be set aside and declared null, void and ineffective on the grounds

(a) that the said defendant, being a corporation organized
24 under the laws of the State of Pennsylvania, wherein it solely carries on its business, and transacting no business within the State of New York or the Eastern District of New York, having no office or place of business within the said State or District, and having no property in said State or District, cannot legally be made a defendant in an action in said State or District by a service upon one of its officers while temporarily in said State of New York; and (b) that the said attempted service of said summons was made by delivering the same or a copy thereof, together with a copy of the complaint, upon said Michael W. O'Boyle outside of the territorial limits of this Court; and why the defendant should not have such other and further order or relief in the premises as to the Court may seem proper.

Let service of this order be made upon the plaintiff by serving a copy thereof, together with a copy of the annexed affidavit, upon his attorney at his office at or before one o'clock p. m. this day and be deemed sufficient service thereof.

Dated, New York, Borough of Brooklyn, May 26, 1915.

THOMAS I. CHATFIELD,
United States District Judge.

25 United States District Court for the Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

STATE OF NEW YORK,
County of New York,
Southern District of N. Y., ss:

Michael W. O'Boyle, being duly sworn, deposes and says: That at all the times hereinafter mentioned he resided and now resides in Pittston, Pennsylvania; that at such times he was and now is President of Greenough Red Ash Coal Company, the defendant herein, which is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania and having its only offices and places of business in the said State of Pennsylvania.

That heretofore and on or about the 7th day of May, 1915, deponent was temporarily in the Borough of Manhattan, City of New York, State of New York, in the Southern District of New York, and while there a person whose name is unknown to deponent delivered to deponent the summons in this action, to which was attached a copy of the complaint. That said papers were so delivered to deponent at No. 80 Broadway, in the Borough of

Manhattan, City of New York, State of New York, in the Southern District of New York. That at said time deponent was temporarily in the State of New York on personal and private business of deponent in no manner connected with or pertaining to the business of the defendant corporation.

26 That the said defendant corporation was not at any of the times referred to in the complaint or in this affidavit and is not now engaged in transacting any business within the State of New York or within the Eastern District of New York, nor did it at any of said times have, nor has it now, any office or place for the transaction of such business within the State of New York or within the Eastern District of New York, nor any officer or agent located within said State or District authorized or empowered to receive service of process within said State or District or upon whom service of such process could lawfully be made, and said corporation did not at any of such times have any property within the State of New York or within the said Eastern District of New York.

Said corporation at all of the times referred to in the complaint and in this affidavit was engaged and now is engaged in the business of owning and operating coal mines solely in the State of Pennsylvania. That the alleged cause of action referred to in the complaint is claimed by the plaintiff to have arisen in the Said State of Pennsylvania and solely under the laws of said State.

That deponent did not at any of the times referred to in the complaint or in this affidavit have and has not now any office or place for the transaction of business in the State of New York or the said Eastern District of New York.

The said defendant corporation appears herein specially for the sole and single purpose of objecting to the jurisdiction of this Court over the defendant in this action and of making this

27 motion to set aside and declare null, void and of no effect the attempted service of the summons herein, together with a copy of the complaint, upon deponent.

That the defendant has not appeared generally herein or served any answer, demurrer or other pleading whatsoever herein.

That no previous application for the relief herein sought has been made to this or any other Court or Judge thereof.

That after so receiving said papers in the Borough of Manhattan, City of New York, deponent took them to his home in Pittston, Pennsylvania, and promptly sent them to Edward Brennan, General Manager of the defendant corporation, at Shamokin, Pennsylvania, where the office and mines of said corporation are located. Deponent is informed and verily believes that both Mr. Brennan and Mr. George C. Graver, the Treasurer of said corporation, were absent from Shamokin and consequently neither of them received said papers. Deponent was informed on or about the 21st inst. by the Secretary of the corporation that Mr. Brennan had been absent and had therefore not seen the papers. On the evening of the same day Mr. Brennan returned to Shamokin and the following day talked with deponent over the long distance telephone. Deponent thereupon requested Mr. Brennan to send the papers to

deponent by special delivery which was done, and deponent received them Saturday afternoon, the 22d inst. On the same day deponent took the matter up with Messrs. William J. Fitzgerald and James F. Bell, attorneys for the corporation at Scranton, Pennsylvania.

At that time the said defendant corporation had no attorneys to represent it in the State of New York and on the 25th inst. deponent came to New York, and together with Messrs. Fitzgerald and Bell engaged Alexander & Green to advise the said corporation
28 in connection with this action and to appear specially herein for the purposes above stated.

MICHAEL M. O'BOYLE.

Sworn to before me this 26th day of May, 1915.
[SEAL.] R. DAMM,
Notary Public, Kings County.

Cert. filed in New York County # 54.

29 [Endorsed:] L. 5-44. United States District Court, Eastern District of New York. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendant. Pd. 20¢. Copy. Affidavit and Order to Show Cause. Alexander & Green, 120 Broadway, Borough of Manhattan, New York City, N. Y., Attorneys for Defendant, appearing specially herein for the sole and single purpose of this motion. Filed May 26, 1915.

Motion granted.
VAN VECHTEN VEEDER,
U. S. D. J.
June 18, 1915.

30 Endorsed on original order to show cause. Filed May 26, 1915. "Motion granted. Van Vechter Veeder, U. S. J. June 18, 1915."

31 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

Amended Complaint.

An order having been made on the 26th day of May, 1915, by Hon. Thomas I. Chatfield, one of the Judges of this Court, upon the motion of the Defendant requiring the Plaintiff within six days from the date thereof to file "an amendment or amended complaint showing whether the Plaintiff is an Alien or a Citizen of the U. S. and if a citizen whether native born or naturalized, and the date and place of such naturalization, if any," the Plaintiff,

by Baltrus S. Yankaus, his Attorney, in pursuance of said order, for this, his amended complaint, respectfully shows to the Court and alleges:

I. That in the Supreme Court of the State of New York, in the County of New York, and on the 4th day of February, 1915, the Plaintiff under the name of Stanislau Maszuk, made and filed his statement and declaration under oath of his bona fide intention to renounce forever all allegiance and fidelity to any foreign Prince, Potentate, State or sovereignty, and particularly to Nicholas II Emperor of all the Russias, of whom he then was a subject; and of his intention in good faith to become a citizen of the United States of America and to permanently reside therein.

II. Upon information and belief, that the plaintiff is an Alien and a subject of the Czar of Russia.

III. That at the time of the commencement of this action, the Plaintiff was and still is a resident of the State of New York,
32 in the Eastern District of New York.

IV. The Plaintiff further alleges upon information and belief, that at all of the times hereinafter mentioned, the Defendant was and is a foreign corporation duly organized and existing under and by virtue of the Laws of the State of Pennsylvania, and having its principal place of business at Shamokin of said State and resident and a resident of said State.

V. That at all of the times hereinafter mentioned and at the time of commencement of this action, the Defendant did and still does business within the State of New York.

VI. That at all of the times hereinafter mentioned, the defendant did and still does own property within the State of New York.

VII. That at all of the times hereinafter mentioned and more particularly at the time of the happening of the accident hereinafter described, the Defendant owned, operated, managed, and controlled Greenough Colliery, near Shamokin, in Northumberland County, in the State of Pennsylvania, and mined and prepared Anthracite Coal and employed more than ten (10) persons in said Colliery or Mine.

VIII. That at all of the times hereinafter stated, the Defendant retained, reserved and maintained to itself the care, control, maintenance and operation of its said Mine, and Colliery and of all the parts and portions thereof and of all rules, ways, means, works, machinery, and was in charge of all instrumentalities in connection with the operation and performance of mining Anthracite Coal in said Colliery.

IX. That at all of the times hereinafter stated, the Defendant supervised, directed and controlled the prosecution and performance of the work in its said Mine and Colliery as well as all of its employees, vice-principals, managers, mining-foremen, and em-
33 ployees of others and all other persons lawfully in and upon, and persons employed and engaged at work therein, including the Plaintiff, and those employed, and engaged at work therein, authorized and empowered and permitted by the Defendant to hire and employ persons to work in its said Mine or Colliery and

to direct, control, and comman- such persons and maintain to itself its rights to employ them and discharge any or all of them including the Plaintiff.

X. That on or about the 8th day of May 1913, and at the time of happening of the accident as hereinafter stated the Plaintiff was employed by the Defendant in said Colliery or Mine.

XI. That on or about the 8th day of May 1913 while the Plaintiff was employed and at the time of the accident hereinafter stated, the Plaintiff under the direction, instructions and in obedience to and conformity with the ways, means and customs, used, allowed and permitted by the Defendant, the Plaintiff was preparing a charge of dynamite to blast and excavate coal and rocks in the Defendant's said Mine and Colliery, when said charge of dynamite exploded and went off unexpectedly without any negligence on the part of the Plaintiff, and without any knowledge of danger to said Plaintiff and caused this Plaintiff to sustain, severe, serious and permanent injuries. It caused the loss of both arms, one of his eyes was totally destroyed, the other was partially, and Plaintiff became nearly totally and permanently blind, and permanently became and remains in such disabled condition and incapable to take care of himself and will remain so permanently. His hearing was destroyed, his ear drums were ruptured, he is now suffering from neurasthenia, traumatic neurosis, and this Plaintiff has suffered great pain, inconvenience and on information and belief that he will continue to suffer permanently.

XII. That the said accident and injuries to this Plaintiff were due solely to the carelessness and negligence of the Defendant, its vice-principals, superintendents, managers, representatives
34 and persons in charge of its works, ways means and machinery and persons in charge of necessary rules and in charge of the tools, machinery, explosives and instrumentalities which were necessary to be used for the operation and performance of the work which the Plaintiff had to perform, and said injuries were caused through the negligence of said Defendant and without any negligence on the part of the Plaintiff.

XIII. The Defendant was careless and negligent, in that the Defendant, its vice-principals, superintendents, agents, representatives and persons in charge of works, ways, means and machinery and in charge of exercise of skill and care directed, instructed, caused, permitted and allowed this Plaintiff to use and apply the dangerous, unfit and improper instruments and tools and appliances and necessary parts in connection therewith which was necessary to be used to combines such charge for the purpose of blasting dangerous, unsafe, unfit, improper, and with lack of skill and care which were necessary to use and to be used in preventing the cause of accidents, injuries and destruction of lives of persons working in said Colliery or Mine, and including the Plaintiff and Defendant failed to take proper steps and to use and exercise of skill and care so to prevent such accidents and injuries.

XIV. The Defendant was careless and negligent in that, the Defendant, its vice-principals, agents, superintendents, representatives

and persons in charge of the ways, means, works and machinery failed to furnish proper, sufficient and necessary tools, appliances and instrumentalities to this Plaintiff and failed to warn him of the danger so that the Plaintiff would have reasonable knowledge how to avoid the danger and injuries as above stated.

XV. The Defendant was car-less and negligent, in that, that the Defendant, its vice-principals, superintendents, agents, repre-
35 sentatives and persons in charge of ways, means works, machinery and in charge of exercise of skill and care, failed to investigate properly the performance and operation and the use of dynamite, to charge and blast and its parts in connection which is used for the purpose to blast and excavate; to discover, disclose and see how the work was done and in that, that it should have used the proper, exercise of skill and care in discovering, and disclosing such dangers and have the same removed and remedied and make the working places safe and fit to work, including the place where the Plaintiff was at work.

XVI. The Defendant was careless and negligent, in that, that the Defendant, its vice-principals, superintendents, foremen, managers, agents, representatives and persons in charge of the ways, works, means and machinery failed to make and promulgate proper rules and see that such rules should be enforced which were necessary in having such work performed in a reasonable safe way and manner by the Plaintiff and its other employees and on the contrary allowed and permitted and caused to have such work and operation performed in dangerous, unskilfull, unsafe manner and without exercise of skill and care so to prevent the injuries to the Plaintiff and persons employed and engaged in said Mine and Colliery, including the Plaintiff.

XVII. The Defendant was careless and negligent, in that, that the Defendant, its vice-principals, superintendents, agents, representatives and persons in charge of its ways, works, means and machinery failed to properly post proper and necessary rules, instructions and directions in writing and printed form and properly framed and failed to keep, and failed to cause, to be kept and to have such rules posted, hung, or posted to structures or other convenient places near and about the entrance of said Mine or Colliery, and have them posted in necessary places as required
36 by the Anthracite Mining Law and according to the duties of a Master which he owes to his servants and *its* employees, and persons engaged in the performance of the work, so that the Plaintiff and employees of the Defendant be able to read and have full knowledge of its existence and its force and enable them to avoid dangers, unsafe, unfit and improper ways or performing their work, and Defendant was further negligent in not having such rules posted and printed in the Lithuanian language, spoken by this Plaintiff and other of Defendant's servants.

XVIII. The Defendant was careless and negligent, in that, that it allowed and permitted its vice-principals, superintendents, managers, mining-foremen and persons in charge of the works, ways, means and machinery to supervise, manage and control the work and operation

in said Mine and Colliery in dangerous and unsafe manner and with lack of exercise of skill and care and without making proper and necessary rules and Defendant also failed to see that the rules were enforced which were necessary for the operation and performance of the work that the Plaintiff had to perform and failed to keep such works, ways and means in reasonable safe way and manner and to prevent unnecessary dangers which may cause accidents and injury to its employees and men working in said Mine, including the Plaintiff.

XIX. The Defendant was careless and negligent, in that, that it employed incompetent, unfit, unskilfull and dangerous vice-principals, superintendents, managers, mining-foremen and persons in charge of the works, ways, means and machinery and allowed them to perform blasting and excavating coal and preparing charges of dynamite using dangerous, unfit and improper instruments in connection therewith and supervising such work without making, posting, and properly delivering necessary rules and ways, and means, including the place and the work where Plaintiff was at, to perform their work under their direction, instruction and with their
37 permission and through such failure the injuries were caused to the Plaintiff, whereby the Defendant by using of exercise of skill and care could have removed the danger and prevented injuries to the Plaintiff.

XX. The Defendant was careless and negligent, in that, that it failed to inspect, locate and discover the dangers which were existing at the time of the Plaintiff's accident under the supervising and control of unskilfull, incompetent, unfit who failed to exercise of skill and care mining-foremen, vice-principals, superintendents, and persons in charge of the ways, means and machinery and failed to remove and discharge such persons and employ and replace them with men competent, skilfull and capable of exercising of skill and care which was necessary to perform the Defendant's work by the Plaintiff and his co-workingmen and prevent injuries to the Plaintiff and the Defendant's other Employees at said Colliery or Mine.

XXI. The Defendant was careless and negligent, in that, that it knowingly and should have known that such management and supervision of the works in its mine was unsafe, improper and dangerous and was operated without furnishing proper tools, instruments and articles to handle and prepare dynamite and explosive parts which composes the charge for the purpose to be used of excavating and blasting coal and rock in said Mine or Colliery; and through such failure the said injuries were caused to the Plaintiff at the time of the accident.

XXII. That the work, then being prosecuted by the Defendant in its said Coal Mine and Colliery and — which the Plaintiff was engaged was under circumstances existing in the said coal mine and colliery attended with great danger to the working men engaged therein, including the Plaintiff, by reason whereof became and was necessary for the Defendant as its duty and of the Defendant's Vice-Principals Superintendents and persons in charge of its ways, means,
38 works, machinery and plant and the work in which the Plaintiff was engaged and entrusted with the authority to

dierct, control and command the Plaintiff, to make, adopt, promulgate, enforce and to see that they were enforced, proper, sufficient and necessary rules, and regulations for the conduct, operation and maintenance of the said Mine and Colliery and the performance of the work therein, and the preparation, charging and exploding of dynamite and *and* other explosives and the manipulation used and handling thereof; but that they failed and ommited to make, adopt, promulgate and enforce such rules, and regulations and wholly disregarded their duty in the premises, in violation of Anthracite Mining Law of the State of Pennsylvania and the duty which the Defendant owned as a duty of master to its servants.

XXXII. The Defendant was careless and negligent in that, that it employed, retained and caused to be and remain in its employment unfit, careless and dangerous, incompetent and lack of exercise of skill and care, the mining-foremen and persons that had charge and control over the Plaintiff and while they were empowered by the Defendant with authority to inspect, direct and to use dangerous tools and instruments and directed the Plaintiff to use the same, and to use unsafe, improper ways and means of mining coal in its Colliery and allowed them to operate, manage and supervise said works without using proper tools and instruments and allowing them to give and deliver improper and unsafe necessary ways and means to the Plaintiff for the purpose to make the working places reasonably safe and for the purpose of handling and preparing dynamite charge or explosives which is used for the purpose to blast and excavate coal and rocks and the Defendant failed to discharge and remove such mining-foremen and persons in charge and replace them with competent, skillfull and capable of exercise of skill and care, to prevent the injuries to the Plaintiff and see that the accidents and dangers should be removed and the Defendant failed to
39 cause to have such operation and performance of such work and in said colliery reasonably and properly safe and allowed and permitted the mining-foremen and persons in charge of works ways and machinery to violate and disregard Anthracite Mining Laws of the State of Pennsylvania which were existing and *been* in force at the time of the accident and which — hereinafter alleged.

XXXIV. That in and by a certain Act and Law of the State of Pennsylvania approved the 2nd day of June, 1891, and in full force and effect at the time of the happening of said accident entitled "An act to provide for the health and safety of persons employed in and about the anthracite coal mine- of Pennslvvania and for the protection and preservation of property connected therewith," it was provided and enacted among other things in Article XII thereof as follows:

Rule 29. When high explosives other than gunpowder are used in any mine, the manner of storing, keeping, moving, charging and firing or in any manner using such explosives, shall be in accordance with special rules as furnished by the manufacturers of the same. The said rules shall be endorsed with his or their official signature and shall be approved by the owner, operator or superintendent of the mine in which such explosives are used.

Rule 30. In charging holes for blasting in slate or rock in any

mine, no iron or steelpointed needle shall be used and a tight cartridge shall not be rammed into a hole in coal, slate or rock with an iron or steel tamping bar, unless the end of the tamping bar is tipped with at least six (6) inches of copper or other soft metal.

Rule 31. A charge of powder or any other explosives in slate or rock which has missed fire shall not be withdrawn or the hole reopened.

Rule 32. A miner or other person who is about to explode a blast by the use of patent or other squibs or matches, shall not shorten the match, nor saturate it with mineral oil, nor turn it down when placed in the hole, nor ignite it except at its extreme end, nor do anything tending to shorten the time the match will burn.

Rule 33. When a workman is about to fire a blast he shall be careful to notify all persons who may be in danger therefrom, and shall give sufficient alarm before and after igniting the match so that any person or persons who may be approaching shall be warned of the danger.

Rule 34. Before commencing work and also after the firing of every blast, the miner working a breast or any other place in a mine, shall enter such breast or place to examine and ascertain its condition, and his laborer or assistant shall not go to the *face* of such breast or place until the miner has examined the same and found it to be safe.

Rule 36. A person who is not a practical miner shall not charge or fire a blast in the absence of an experienced miner, unless he has given satisfactory evidence of his ability to do so with safety and has obtained permission from the mine foreman or person in charge.

Rule 37. An accumulation of gas in mines shall not be removed by brushing where it is practicable to remove it by brattice.

Rule 54. For the purpose of making known the rules and the provisions of this act to all persons employed in or about such mine or colliery to which this act applied, an abstract of the act and rules shall be posted up in legible characters in some conspicuous place or places at or near the mine or colliery where they may be conveniently read by the persons employed, and so often as the same become obliterated or destroyed the owner, operator or superintendent shall cause them to be renewed with all reasonable dispatch. Any person who pulls down injures or defaces such abstract of the act or rules when posted up in pursuance of the provisions of this act, shall be guilty of an offense against this act.

XXV. And it was further enacted by Article XVII, Section 8, and in full force and effect at the time of happening of the accident among other things as follows:

Section 8. That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any owner, operator, superintendent, mine foreman or fire boss of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow

and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained.

XXVI. The Defendant was further negligent in that, that the Defendant, its vice-principals, superintendents, representatives and persons in charge and control of the ways, means, works and machinery, that they employed the Plaintiff for the purpose to
41 handling dynamite and compose a charge out of explosive parts for the purpose to blast and explode coal and rocks without possessing, leaving and having registered with the employer a proper Miner's Certificate, in accordance and requirements of Anthracite Mining Laws of the State of Pennsylvania and in violation, disobedience and disregard of such laws as herein stated, the Defendant, its vice-principals, superintendents, agents, representatives and persons in charge as herein stated in this paragraph and in violation of the laws alleged in this complaint, negligently and carelessly employed, directed, instructed, allowed, permitted and required this Plaintiff to use handle and prepare dynamite, explosives, and charges for the purpose to blast and excavate coal and rocks in said colliery and the Defendant's Mine and through such violation, disobedience and disregard of said laws by the Defendant and its said Agents caused the injury to the Plaintiff as herein alleged.

XXVII. That in and by a certain act and law which is known as the Anthracite Mining Law of the State of Pennsylvania and being in full force and effect at the time of the happening of the accident hereinbefore stated, approved the 15th day of July 1897 among other things reads as follows:

To protect the lives and limbs of miners from the dangers resulting from incompetent miners working in the anthracite coal mines of this Commonwealth, and to provide for the examination of persons seeking employment as miners in the anthracite region, and to prevent the employment of incompetent persons as miners in anthracite coal mines, and providing penalties for a violation of the same.

Section 1. Be it enacted, &c., That hereafter no person whosoever shall be employed or engaged in the anthracite coal region of this Commonwealth, as a miner in any anthracite coal mine, without having obtained a certificate of competency and qualification so to do from the "Miners' Examining Board" of the proper district, and having been duly registered as herein provided.

Section 5. That no person shall hereafter engage as a miner in any anthracite coal mine without having obtained such certificate as aforesaid. And no person shall employ any person as
42 a miner who does not hold such certificate as aforesaid, and no mine foreman or superintendent shall permit or suffer any person to be employed under him or in the mines under his charge and supervision as a miner, who does not hold such certificate. Any person or persons who shall violate or fail to comply with the provisions of this act, shall be guilty of a misdemeanor, and on conviction thereof shall be sentenced to pay a fine not less than one hundred dollars and not to exceed five hunderd dollars, or shall undergo imprisonment for a term not less than thirty days and not

to exceed six months, or either, or both, at the discretion of the court.

XXVIII. A further act and law of the State of Pennsylvania was in full force and effect at the time of happening of the accident which was approved the 29th day of May 1901 among other things reads as follows:

Relating to anthracite mines, and providing for the care and life and attention of employes injured in and about said mines.

Section 7. The term "coal mine," as herein used, includes the shafts, slopes, drifts or inclined planes, connected with the excavation penetrating coal stratum or strata, which excavations are ventilated by one general air current, or division thereof, and connected by one general system of mine railroads, over which coal may be delivered to one or more parts outside the mine. The term "mine foreman" means the person who shall have, on behalf of the operators, immediate supervision of a coal mine. The term "operator" means any firm, corporation or individual operating any coal mine. The term "anthracit- mine" shall include any coal mine not now included in the bituminous boundaries.

XXIX. That the Defendant, its Vice-Principals, Superintendents, Managers, Foremen, Representatives, Agents, and the persons in charge of the work and the place where the Plaintiff was engaged at work and entrusted with the authority to direct, control and command the Plaintiff, carelessly and negligently and in violation of the provisions and requirements aforesaid, of such acts and laws negligently used and employed in the said mine and colliery, iron or steel pointed needles to be used in making holes through sticks of dynamite in charging of holes for blasting and in every way wholly failed and omitted to comply with said acts and laws in each of its said requirements and provisions.

43 XXX. That in and by a further act and law of said State of Pennsylvania, approved the 10th day of June, 1907, and in full force and effect at the time of the happening of the accident, entitled "An act extending and defining the liability of employers, in action for negligence, for injury or death of their employes; declaring what shall not be a defense in such actions against their employers, and defining who are agents of the employers" under this act.

Section 1. Be it enacted, &c., That all action brought to recover from an employer for injury suffered by his employe, the negligence of a fellow servant of the employe shall not be a defense, where the injury was caused or contributed to by any of the following causes; namely—,

And defect in the works, plant or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman or any other person in charge or control of the works, plant or machinery; the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury or death; the negligence of any person to whose orders the employe was bound to conform, and did conform,

and, by reason of his having conformed thereto, the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer, or any other person who has authority to direct the doing of said act.

Section 2. The manager, superintendent, foreman or other person in charge or control of the works, or any part of the works, shall, under this act be held as the agent of the employer, in all suits for damages for death or injury suffered by employes.

Section 3. All acts or parts of acts inconsistent hereto be and the same are hereby repealed.

XXXI. That solely of the carelessness and negligence of the defendant, its vice-principals, superintendents, managers, foremen, representatives and the person or person- in charge of the work, and the place where the plaintiff was engaged at work and entrusted with authority to direct, control and command the plaintiff, the plaintiff sustained severe, serious and permanent injuries, including the loss of both arms and hands, below the — *hands,*
44 *below the* elbows, loss of his right eye, which was blown out, and injury to his left eye, the sight of which has become impaired and affected by the accident; his sight has almost been destroyed and injuries to both ears, which have almost destroyed his hearing; and as he is informed and verily believes he will ultimately lose the sight of his left eye entirely and become completely blind; and he was otherwise injured and sustained severe, and serious injuries to his nerves and nervous system and he was rendered sick, sore and disabled and so continues and will permanently so remain and he suffered and suffers and will permanently suffer great physical and mental pain; and he was confined to bed and to his home and still has and will permanently be at times so confined and compelled to undergo medical and surgical treatment in endeavoring to be cured of his injuries and in order to alleviate his pain and suffering; and he has been compelled and will hereafter permanently be compelled to expend large sums of money for such treatment and for medicines and as he is informed and verily believes he will require the services of nurses or attendants in and about such treatment and be compelled to expend large sums of money therefor; and that ever since the happening of the said accident he has been, still is and will permanently be incapacitated and disabled from doing any work or earning any moneys; and he has been, still is, and will permanently be compelled to hire persons to help assist take care of and attend him at great cost and expense to him for such services and such persons; all to his damage in the sum of One Hundred and Fifty Thousand Dollars ($150,000.00).

Wherefore, plaintiff demands judgment against the Defendant for the sum of One Hundred and Fifty Thousand Dollars, ($150,000.00), besides the costs and disbursements of this action.

BALTRUS S. YANKAUS,
Attorney for Plaintiff.

154 Nassau Street, Borough of Manhattan, New York.

4—229

45 District Court of the United States, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED COAL COMPANY, Defendant.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Stanley Meisukas, being duly sworn, deposes and says that he is the Plaintiff in the within entitled action; that he has heard read the foregoing amended complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HIS
STANLEY X MEISUKAS.
MARK

Sworn to before me this 1st day of June 1915.
C. W. WIMBERLY,
Notary Public of Kings Co., N. Y. # 159.

Certificate filed in County Clerk's office N. Y. Co. # 99 and in Register's office, N. Y. Co. #7199.
My commission expires March 30, 1917.

Endorsed: Amended Complaint. Filed June 2, 1915.

46 [Endorsed:] L. 544. United States District Court, Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendants. Pd. 10¢. Copy. Amended Complaint. Baltrus S. Yankaus, Attorney for Plaintiff. 154 Nassau Street, Borough of Manhattan, New York City. Filed June 2, 1915.

47 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

STATE OF NEW YORK,
City and County of New York, ss:

Baltrus S. Yankaus, being duly sworn deposes and says, that he is the Attorney for the Plaintiff in the above entitled action and that he has his post-office address and his place of business at No. 154 Nassau Street, in the Borough of Manhattan, City of New York.

That this action was brought to recover the sum of One Hundred Fifty Thousand (150,000) Dollars as damages for personal injuries which occur-ed on the 8th day of May, 1913, "and now the Statute of limitation to commence a new action has run," consisting of the loss of both forearms and loss almost entire eye-sight and hearing as well as other injuries alleged to have been sustained by the Plaintiff through the negligence of the Defendant, and the action was commenced by the service of a copy of the summons and complaint upon the Defendant, upon information and belief by delivering the same and leaving it with one Michael W. O'Boyle on the 7th day of May, 1915 at his office, No. 80 Broadway, City of New York and State of New York, who is the President of the Defendant, corporation in this action.

48 Thereafter the Defendant purporting to appear specially herein on the 26th day of May, 1915, for the purpose of setting aside the said service of the summons and complaint, obtained from Honorable Thomas I. Chatfield, one of the Judges of this Court an Order to Show Cause based upon the Affidavit of the said Michael W. O'Boyle sworn to on the 26th day of May, 1915, requiring the Plaintiff or Deponent the Plaintiff's Attorney to show cause at a term of this Court to be held on the said 26th day of May 1915, at 2 o'clock in the afternoon of said day, why the said summons and the attempted service thereof and of said complaint should not be set aside and declared null, void, and ineffective upon the grounds as set forth in the said order to show cause, namely:

That the Defendant is a foreign corporation organized under the laws of the State of Pennsylvania, that it is not engaged in the transaction of any business in the City of New York and the Eastern District, that it has no office or place of business within said State or District, that it has no officer or agent with authority represented in said State or District, that it has no property within said State or District, and that the said attempted service of the said summons made by delivering the same or a copy thereof together with a copy of the complaint upon said Michael W. O'Boyle, who is the President of the Defendant, corporation was outside of the territorial limits of this Court.

That on said day at 2 o'clock in the afternoon, deponent attended upon the return of said Order to Show Cause before Honorable Thomas I. Chatfield, District Judge and the Defendant appeared in support of this motion by its Attorneys Alexander & Green. That when said motion was called for hearing and argument, deponent requested the presiding Judge to adjourn the hearing thereof,

49 upon the ground that the moving papers consisting of said Affidavit and Order to Show Cause had been served on Deponent only about one hour and forty-five minutes before the motion was made returnable, and that Deponent had not had sufficient opportunity to prepare his opposition thereto.

That the Defendant through its said Attorneys stated to the Court the nature and object of the motion and the grounds upon which the same was based and objected to any adjournment of the argument.

During the colloquy ensuing, the Defendant's said Attorneys to

Deponent's best recollection stated to the Court and made a point that the Plaintiff was not a Citizen of the United States and had no standing in the Court for that reason and thereupon requested and demanded of the Court an Order requiring the Plaintiff either to file Affidavits or so amend his complaint as to show positively whether or not the Plaintiff is an Alien or Citizen of the United States, and if Citizen, and how and in what manner his Citizenship was acquired.

Thereupon and for the purpose of the Defendant procuring such an Order to be made the Court adjourned the argument of said motion to the 9th day of June 1915: That as a condition of such adjournment the time of the Defendant to appear generally herein and answer, plead or otherwise move if it be so advised to be and the same hereby is extended until 10 days after the service upon its Attorneys, who have appeared specially herein for it of a copy of such Order and as may be made upon the determination of this motion with notice of entry thereof, and that such extension hereby granted shall be without prejudice to the rights of the Defendant in the premises.

Deponent states that such order was obtained by the Defendant from the court without any consent of the Deponent, Plaintiff's Attorney or Plaintiff.

50 Deponent further states that while he was in said Court to oppose the said motion, and after the Defendant made said statement to the Court as to the Plaintiff being an Alien then and there the Defendant insisted that the Plaintiff should file Affidavits or amend his complaint stating positively whether he is a Citizen of the United States or an Alien, and asked for an Order of the Court to compel the Plaintiff to file Affidavits or amended complaint to that effect, then and there the Court granted the Defendant's said application and request, and obtained such Order from Honorable Thomas I. Chatfield, and filed the same in the office of the Clerk of this Court on the 26th day of May, 1915, and paid the Clerk's fees for filing the same in the presence of the Deponent.

Deponent states that on the 28th day of May, 1915, a copy of said Order was served on the Deponent, Plaintiff's Attorney by the Defendant's Attorneys Alexander & Green together with a Notice of Entry thereof.

That the concluding paragraph of the said Order that was obtained by the Defendant or his Attorneys and served as above stated is as follows:

"And it is further ordered, that the Plaintiff within six days file an amendment or amended complaint showing whether the Plaintiff is an Alien or a Citizen of the U. S. and if a Citizen whether native born or naturalized and the date and place of such naturalization, if any."

Which said order is signed by the Honorable Thomas I. Chatfield, U. S. D. J.

After the service of said order by the Defendant upon Deponent, Plaintiff's Attorney, the Plaintiff complied with such order and filed amended complaint within the time ordered.

That a true copy of the said order together with notice of filing and entry thereof is hereunto annexed and made a part of this Affidavit.

That the Plaintiff is and at all of the times was an Alien and subject of the Czar of Russia alleged in paragraph "II" of the
51 Amended Complaint.

The Plaintiff also alleges in his Amended Complaint in paragraph "III" that he is a Resident within the Eastern District of New York.

Deponent further states upon information and belief that the Defendant Greenough Red Ash Coal Company is a foreign corporation duly organized under and by virtue of the laws of the State of Pennsylvania as alleged in the Plaintiff's Amended Complaint in this action in paragraph "IV."

Deponent further says that paragraph "V" of the said Amended Complaint contains an allegation that at all the times mentioned in said complaint and at the time of the commencement of this action the Defendant did and still does business within the State of New York.

Deponent further says that paragraph "VI" of said Amended Complaint contains an allegation that at all of the times mentioned in said complaint the Defendant did and still does own property within the State of New York.

Deponent further says that since reading the said Affidavit of said Michael W. O'Boyle, he, deponent, has caused an inquiry and investigation to be made with a view to the conformation of the allegation contained in said complaint to the effect that Defendant at all times referred to was engaged in business in the State of New York and such investigation so made discloses that the coal produced by the Defendant at its mines in the State of Pennsylvania is sold in the City and State of New York, Long Island and Borough of Brooklyn, and through the Susquehanna Coal Company and its Managing Agent, George H. Bressette at No. 1 Broadway, in the Borough of Manhattan, and Deponent believes and has reason to believes that the information so gained by him is accurate.

52 That deponent further says upon information and belief that the Treaty between the United States and the Czar of Russia still exists and the plaintiff being an Alien is entitled to the protection under the said Treaty, therefore, deponent verily believes that this Court has jurisdiction of this action and of cause of action therein stated and set forth.

Deponent further states upon information and belief, that prior and at the time of the commencement of this action the Act of Congress was and is now in force which reads, at section 3925 of compiled Statute (R. S. Sec. 1977), as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to

like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

That deponent verily believes that this action was properly instituted in this court and the court has jurisdiction thereof.

Deponent further states that deponent believes that this plaintiff is entitled to the full protection of said Treaty and said Statute as any Citizen of the United States that may attempt to bring an action in Eastern District of New York and such action should be maintained in the said Court.

Deponent further says that on the 9th day of June, 1915, when deponent appeared in opposition to this motion, he, deponent asked permission to file a memorandum and affidavits in opposition to said motion which application was granted, and then and there defendant's counsel asked the Court to direct the plaintiff's attorney, the deponent, to serve copies of such affidavits and memorandum on the attorneys for the defendant, and deponent will comply with such demand and order.

53 Deponent further says that nearly one year before the actual service of the summons in this action upon said Michael W. O'Boyle, he, deponent commenced his efforts to procure the service of said summons upon the Defendant and to that end he ascertained the name of the Defendant's President and from a publication known as a Directory of Directors in New York City for the year 1914, on page 477 the following entry appears:

O'Boyle, Michael W., 40 Cedar St., Urban-Borough Land Co., Dir.

Deponent further says that in the City Directory published in and for the year 1915, in New York City on page 1394 thereof the following entry appears:

Michael W. O'Boyle, treas. Urban-Borough Land Co. h. Pittston, Pa.

And on page 1860 of said Directory appears the following entry.

Urban Borough Land Co. (N. Y.), Chas. H. Briggs pres. Mich'l W. O'Boyle, treas. Theo. C. Atchison, sec. 277 B'way R1506.

Deponent further states upon information and belief that said Michael W. O'Boyle has his office with others at No. 80 Broadway, New York City and during the past year deponent caused to be made various inquiries and employed men to watch and locate the whereabouts of said O'Boyle and for the purpose of making such services deponent was informed by various persons that he so employed that at the offices above stated, that is, 40 Cedar Street and 277 Broadway the persons around the building and in the offices refused to give any information and deponent was not able to cause such service to be made on Michael W. O'Boyle until about the 7th day of May, 1915.

54 Deponent further says that he was informed during the course of said inquiries that the said Michael W. O'Boyle was in the habit of visiting the City frequently, but notwithstanding the most diligent effort to find him in the City with a view to the service of said summons Deponent was unable to locate him until the time above stated, to wit: the 7th day of May, 1915.

That Deponent investigated the action at Bar and verily believes

that this Plaintiff has a good and substantial cause of action against the Defendant, Greenough Red Ash Coal Company.

BALTRUS S. YANKAUS.

Sworn to before me this 10th day of June, 1915.

[SEAL.] WM. I. COHEN,
Notary Public, Kings Co. 115; *New York Co.* 130.

[Endorsed:] L. 5-44. United States District Court, Eastern Distrist of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendant. Pd. 10¢. Affidavit. Baltrus S. Yankaus, Attorney for Plaintiff, 154 Nassau Street, Borough of Manhattan, New York City. Filed June 10, 1915.

55 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

SIR: You will please take notice, that an order in this action, a copy of which is herewith served upon you, was duly made herein on the 26th day of May, 1915, and was this day duly entered herein and filed in the office of the Clerk of this court, in the United States Court House and Post Office Building, in the Borough of Brooklyn, City of New York. Dated New York, May 26, 1915.

Yours, etc.,

ALEXANDER & GREEN,
Attorney- for Defendant, Appearing Specially Herein for the Sole and Single Purpose of the Motion to Set Aside the Service of the Summons.

Office and P. O. Address, No. 120 Broadway, Borough of Manhattan, New York City.

To Baltrus S. Yankaus, Esq., Attorney for Plaintiff.

56 In the United States District Court, for the Eastern District of New York at Brooklyn, N. Y., May 26, 1915.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

Present, Thomas I. Chatfield, U. S. D. J.

An order having been made this 26th day of May, 1915, upon a special appearance by the defendant directing the plaintiff or his attorney to show cause why the summons and the attempted service

of the summons herein should not be set aside and declared null, void and ineffective, and the plaintiff having applied for an adjournment of the hearing upon the said order to show cause; it is upon the said petition & order to show cause & the complaint.

Ordered that such hearing upon said order to show cause be and the same hereby is adjourned to the 9th day of June, 1915, at two o'clock in the afternoon of that day at the same time and place as stated in said order to show cause; and it is further

Ordered that as a condition to such adjournment the time of the defendant to appear generally herein and answer, plead or otherwise move if it be so advised be and the same hereby is extended until ten days after the service upon its attorneys, who have appeared specially herein for it, of a copy of such order as may be made upon the determination of this motion with notice of entry thereof, and that such extension hereby granted shall be without prejudice
57 to the rights of the defendant in the premises and it is further

Ordered that the plaintiff within six days file an amendment or amended complaint showing whether the plaintiff is an alien or a citizen of the U. S. and if a citizen whether native born or naturalized and the date and place of such naturalization if any.

THOMAS I. CHATFIELD,
U. S. D. J.

Endorsed: Affidavit. Filed June 10, 1915. Copy received June 10, 1915. Alexander & Green, Attorneys for defendant appearing specially for the sole purpose of the motion to set aside service of summons.

58 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Allan McCulloh, being duly sworn, deposes and says: that he is an attorney-at-law duly admitted to practice in this Court; that he is a member of the firm of Alexander & Green, of No. 120 Broadway, Borough of Manhattan, City of New York, State of New York, who have appeared specially herein for the defendant for sole and single purpose of objecting to the jurisdiction of this Court over defendant in this action, and of making a motion to set aside and declare null, void and of no effect the attempted service of a summons herein, together with a copy of the complaint upon the defendant herein.

That the order to show cause upon the above mentioned motion was made by the Hon. Thomas I. Chatfield, United States District

Judge, in the forenoon of the 26th day of May, 1915, and was served upon plaintiff's attorney on said day at 12:15 P. M., as will appear by the endorsement upon the original affidavit and order to show cause now on file. The order was made returnable in the afternoon of the same day at 2 P. M. In view of the short time elapsing between the issue and service of the order and the return thereof, deponent anticipated that an application for an adjourn-
59 ment would be made, and accordingly before going to court prepared and had typewritten a proposed order for submission to the court in case any adjournment should be granted. Deponent thereupon attended court upon the motion.

When the motion was called for hearing, deponent announced that he was ready to proceed. Thereupon plaintiff's attorney requested an adjournment, as stated in his affidavit verified herein June 10, 1915, and, as also stated in said affidavit, deponent opposed any adjournment in view of the fact that defendant's time to appear generally and to answer, plead, or otherwise move if it should be so advised, would expire the following day and deponent wished the motion heard and determined before such expiration. Thereupon a somewhat general discussion ensued between the court and the attorneys for the respective parties as to the subject matter of the motion and the question of jurisdiction. The question of the plaintiff's citizenship or alienage was not specifically involved in the motion and was not raised by deponent, although deponent in the course of such discussion did say that the defendant had serious doubts that plaintiff was a citizen of the United States or a bona fide resident of the Eastern District of New York and believed that he was an alien. During the discussion the court stated that he would grant plaintiff's application for an adjournment, but would require him to serve an amended complaint setting forth the facts as to plaintiff's citizenship or alienage. In reply to this suggestion, deponent stated, in effect, that he did not see how an amended complaint could be served as his firm was not authorized to accept the same and the defendant was not within the jurisdiction, whereupon the court, in effect, stated that he would nevertheless in granting the adjournment direct the *pa*lintiff to file an amended complaint setting forth specifically whether the plaintiff was an alien or a citizen, and if a citizen, whether native born or naturalized. This direction was made by the court of his own motion, although deponent did say, after the court had an-
60 nounced his intention to grant the adjournment, that if such an order were made it should require the plaintiff, if he claimed to be naturalized to state the time and place of his naturalization. This, the court said, he would require the plaintiff to do. The court further stated, in substance, that the adjournment and the proceedings directed to be taken in connection therewith were to be without prejudice to the rights of the defendant. Thereupon deponent handed up to Judge Chatfield the proposed order, which was typewritten, covering the condition of the adjournment, which as above stated deponent had prepared in anticipation of an application by plaintiff for such adjournment, and the Judge, after

reading the same, took his pen and modified the order in his own handwriting, as will appear by an inspection of the original order now on file. The order after being so amended and signed by the Judge was handed to deponent and deponent after reading it, handed it to plaintiff's attorney, who read it and then handed it back to deponent, and deponent thereafter filed it in the office of the Clerk.

The chief alteration made in said order by the Judge as above stated consisted in making it into a court order by prefixing the usual caption, and the chief addition consisted of the following provision written by Judge Chatfield at the end of the proposed order:

"Ordered that the plaintiff within six days file an amendment or amended complaint showing whether the plaintiff is an alien or a citizen of the U. S., and if a citizen, whether native born or naturalized, and the date and place of such naturalization, if any."

In connection with the objection made by deponent to the adjournment of said motion, deponent also stated in effect that if such adjournment should be granted at the request of the plaintiff it should be done only upon the express condition that the defendant's time to appear generally herein and answer, plead or otherwise move if it should be so advised, which time had not then expired, should be extended until a reasonable time after the determination of said motion, and that such extension should be without prejudice to the rights of the defendant in the premises. No objection to such conditions was made by the plaintiff's attorney, and the Court stated that such conditions would be imposed. Thereupon, as hereinbefore stated, Judge Chatfield made the order which was duly entered and filed herein on the said 26th day of May, 1915, to which reference is hereby made as though a copy were incorporated herein as part of this affidavit.

61

ALLAN McCULLOH.

Sworn to before me this 14th day of June, 1915.

[SEAL.] R. DAMM,
Notary Public, Kings County, #54.

Certificate filed in New York County. No. 54.

[Endorsed:] L. 5/44. United States District Court, Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendant. Pd. 10¢. Affidavit. Alexander & Green, 120 Broadway, Borough of Manhattan, New York City, N. Y., Attorneys for defendant, appearing specially herein for the sole and single purpose of this motion. Filed June 14, 1915.

62 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

Notice of Settlement.

SIR: You will please take notice that annexed hereto is a proposed order, which will be presented for settlement to the Honorable Van Vechten Veeder, United States District Judge, at his Chambers in the United States Court House and Post Office Building, in the Borough of Brooklyn, City of New York, in the Eastern District of New York, on the 23d day of June, 1915, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated, New York, June 22, 1915.

Yours, &c.,

ALEXANDER & GREEN,
Attorneys for Defendant, Appearing Specially Herein for the Sole and Single Purpose of the Motion to Set Aside the Service of the Summons.

Office & P. O. Address, No. 120 Broadway, Borough of Manhattan, City of New York.

To Baltrus S. Yankaus, Esq., Attorney for Plaintiff, 154 Nassau.

Due service of a copy of the within proposed order and notice of entry is hereby admitted.

Dated New York June 22nd, 1915.

BALTRUS S. YANKAUS,
Att'y for Pl'ff.

Copy received June 22, 1915.

63 At a Stated Term of the United States District Court for the Eastern District of New York, Held at the United States Court-house and Post-office Building, in the Borough of Brooklyn, City of New York, in the said Eastern District of New York, on the 28th Day of June, 1915.

Present: Hon. Van Vechten Veeder, United States District Judge.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL COMPANY, Defendant.

An order dated the 26th day of May, 1915, having been made herein by Hon. Thomas I. Chatfield, United States District Judge, upon application of the defendant, appearing specially herein for

the sole and single purpose of objecting to the jurisdiction of this Court over the defendant in this action and of making a motion to set aside and declare null, void and of no effect the attempted service of the summons herein, together with a copy of the complaint, which said order directed the plaintiff or his attorney to show cause before this Court on said 26th day of May, 1915, why the summons and the attempted service of the same, made by delivering a copy thereof, together with a copy of the complaint, to Michael W. O'Boyle, should not be set aside and declared null, void and ineffective on the grounds stated in said order, and the motion upon said order to show cause having come on to be heard before this Court on the 26th day of May, 1915, and the plaintiff having applied for an adjournment of the hearing upon said order to
64 show cause, and the Court upon such application having by order dated, entered and filed the said 26th day of May, 1915, directed that the said motion be adjourned to the 9th day of June, 1915, upon the terms and conditions stated in said order, and the said motion having thereafter and on the said 9th day of June, 1915, duly come on to be heard, and the Court having heard Clifton P. Williamson, Esq., of counsel for the defendant, appearing specially herein for the sole purpose stated, in support of said motion, and Baltrus S. Yankaus, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had;

Now, on reading and filing the said order to show cause dated May 26, 1915, made by Hon. Thomas I. Chatfield, United States District Judge, the affidavit of Michael W. O'Boyle thereto annexed, verified the 26th day of May, 1915, with proof of due service of copies thereof upon the attorney for the plaintiff, and the affidavit of Allen McCulloh, verified the 14th day of June, 1915, and the affidavit of Baltrus S. Yankaus, verified the 10th day of June, 1915, and on reading the summons, complaint, amended complaint and the order made and entered herein on the 26th day of May, 1915, adjourning the hearing upon the order to show cause to June 9, 1915, upon conditions and with directions, all now on file in this Court, it is, on motion of Alexander & Green, attorneys for the defendant, appearing specially herein for the sole and single purpose of objecting to the jurisdiction of this Court over the defendant in this action and of making the said motion to set aside and declare null, void and of no effect the said attempted service of the summons herein, together with a copy of the complaint upon the defendant, it is

Ordered that the said motion be, and the same hereby is, granted, and the attempted service of the summons herein, together with a copy of the complaint, upon the defendant herein by deliver-
65 ing the said summons or a copy thereof, together with a copy of the complaint, to Michael W. O'Boyle on or about the 7th day of May, 1915, at No. 80 Broadway, in the Borough of Manhattan, City of New York, State of New York, be, and the same hereby is, set aside and declared null, void and of no effect.

VAN VECHTEN VEEDER.
United States District Judge.

66 [Endorsed:] L. 5-44. United States District Court, Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Company, Defendant. Charge 10¢. Order Setting Aside Attempted Service of Summons. Alexander & Green, 120 Broadway, Borough of Manhattan, New York City, N. Y. Attorney for Defendant, appearing specially for the sole and single purpose of the motion to set aside the service of the summons. Filed and entered June 28, 1915.

67 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL CO., Defendant.

On motion of Baltrus S. Kankaus, Esq., attorney for the plaintiff, it is hereby

Ordered that a writ of error to the Supreme Court of the United States, and that the question of jurisdiction arising from the said 28th day of June, 1915, be and the same is hereby allowed, and that a certified transcript of the record, proceedings and documents be forthwith transmitted to the said Supreme Court of the United States, and that the quesion of jurisdiction arising from the said proceedings and documents be and the same hereby is certified to the said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of ($250.).

Dated, July 27, 1915.

Enter.

THOMAS I. CHATFIELD,
Judge of the United States District Court for the Eastern District of New York.

68 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL CO.. Defendant.

To the Hon. Thomas I. Chatfield, District Judge.

SIR: The above named Stanley Meisukas, the plaintiff, by his attorney, Baltrus S. Yankaus, feeling ag-rieved by the order rendered against him and entered in the above entitled cause, on the 28th day of June, 1915, does hereby pray for a writ of error, and does hereby appeal from the said order to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and he prays that this writ of error be allowed and that a citation be issued as provided by law, and that a transcript of the

record, proceedings and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States, and that the question of jurisdiction of this Court, arising out of the said proceedings and documents, be certified to the aforesaid Supreme Court of the United States, and such other and further order or orders and process, as may cause the same to be corrected by the said Supreme Court of the United States.

And your petitioner further prays that the proper order
69 relating to the required security to be required of him be made.

No previous application has been made for a writ of error herein.

Dated, July 27, 1915.

Yours etc.,

BALTRUS S. YANKAUS,
Attorney for Plaintiff.

Office & P. O. Address, 154 Nassau Street, Borough of Manhattan, City of New York.

[Endorsed:] L. 5-44. United States District Court, Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Co., Defendant. Petition and Order for Writ of Error. Baltrus S. Yankaus, Attorney for Plaintiff, 154 Nassau Street, Borough of Manhattan, New York City. Filed and entered July 27, 1915.

70 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff-in-Error,
against
GREENOUGH RED ASH COAL COMPANY, Defendant-in-Error.

Assignment of Errors.

Now comes Stanley Meisukas, the plaintiff-in-error, by Baltrus S. Yankaus, his attorney, and says, that in the above entitled cause, there are manifest errors in the proceedings on a motion made by the Defendant-in-Error, in the above entitled matter, to set aside the service of the summons herein, together with a copy of the complaint, upon the defendant, and to declare the same null, void and ineffective, and in ordering that the service of the summons herein, together with a copy of the complaint served upon the defendant herein, by delivering the said summons or a copy thereof, together with a copy of the complaint to Michael W. O'Boyle, on or about the 7th day of May, 1915, at No. 80 Broadway, in the Borough of Manhattan, City of New York, State of New York, be set aside and declared null, void and of no effect; that in the said granting of the said motion by this Court and in the making of the said order, this Court erred and for the purpose of having the same reviewed in the United States Supreme Court, viz.: The United States District Court, Eastern District of New York erred:

I.

The Court erred over the objection of the plaintiff in failing to hold that the said Court acquired jurisdiction over the de-
71 fendant by the service of the summons, together with a copy of the complaint upon Michael W. O'Boyle, president of the said corporation within the State of New York.

II.

The Court erred over the objection of the plaintiff in granting the motion of this defendant that the service of the summons and complaint be set aside and declared null, void and of no effect, in view of the allegation in the original complaint which is now on file in said Court, alleging the facts that the plaintiff is a citizen of the State of New York, and a resident of the Eastern District of New York, and that the defendant is a foreign corporation of the State of Pennsylvania, doing business within the State of New York and having property within such state, and in view of the evidence shown by an affidavit of the plaintiff's attorney, Baltrus S. Kankaus, that this defendant has property within the Eastern District of New York, and doing business within the said district, and George H. Bressette, agent of the defendant, within the City of New York, and in view that the defendant in this action did not claim any violation of its rights under the Federal Constitution of the 14th amendment, taking its property away, without due process of law.

III.

The Court erred over the objection of the plaintiff in granting the defendant's motion that the service of the summons and complaint be set aside and declared null, void and of not effect, in view of the fact that the defendant obtained an order from the Court to compel the plaintiff to file an amendment to the complaint or amended complaint within six days from such order and by having the same served by the defendant upon the plaintiff, under which order the plaintiff was compelled to plead that he is an alien and a subject of the Czar of Russia, and a resident of the Eastern District of New York and State of New York, and in view of
72 the fact by an affidavit of Baltrus S. Kankaus, which shows that the corporation is a foreign corporation of the State of New York, and doing business and having property within State of New York and Eastern District of New York, through its agents, Susquehanna Coal Company and other corporations of the State of Pennsylvania, and through and by George H. Bressette, Managing Agent of the State of New York and in the Eastern District of New York, which part of affidavit remained uncontradicted by the defendant, and in view of the facts that appeared that the plaintiff was and is within the jurisdiction of the United States and he is entitled to the same benefits and rights as any citizen of the United States, by an act, known as "The Judicial Code," Sec. 51

as amended act of March 3, 1911, Chap. 231, Section 51 (Sec. 1033 of the U. S. Comp. Stat. 1913) which provides as follows:

"Civil suits: Where to be brought.

Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding actions, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the resident of either the plaintiff or the defendant."

and the further act known as the Act of May 31, 1870, c. 114, Sec. 16, 16 Stat. 114 (Sec. 3925 of the U. S. Comp. Stat., 1913, Title XX IV), which provides as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

and the further act of Congress, known as "The Judicial Code." Section 24, as amended, Act of Dec. 21st, 1911, c. 5, (Sec. 73 991 of the U. S. Compiled Statutes, 1913), in full force and effect at all of the times hereinafter mentioned, and at the time of the commencement of this action, which said act is applicable in part to the District Courts of the United States, and their jurisdiction, and which provides in Chapter 2, Section 24 thereof, in part as follows:

"The District Courts shall have original jurisdiction as follows: First. Of all suits of a civil nature at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same state, claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and (*a*) arises under the constitution of law of the United States, or treaties made, or which shall be made, under their authority, or (*b*) is between citizens of different states, or (*c*) is between citizens of a state and foreign states, citizens or subjects."

and in view of the fact that this action was properly instituted into this court against this defendant.

IV.

That the plaintiff asked for protection and the benefit of the United States Constitution and under the treaties between the Czar

of Russia and the United States, and under the acts of Congress which provided that the action may be maintained in a district where the defendant is an inhabitant and in view of the fact that the defendant was a citizen and resident of the State of Pennsylvania and doing business and having property within the Eastern District of New York, and an inhabitant of such district, and the State of New York, and the service of the summons and complaint was made within the City of New York, in compliance with the rules and laws of the State of New York, as provided by the Code of Civil Procedure of the State of New York, as this cause is
74 an action at law, therefore the service was made properly on this defendant in accordance with the act of Congress, known as Section 914 of the Revised Statutes of the United States (Being Section 1537 of the compiled Statute) declares as follows:

"The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the District Courts now conform as near as may be to the practice, pleading and form and modes of proceedings existing at the time in like causes in the courts of record of the State within which said District Courts are held, any rule of court to the contrary not withstanding."

V.

That the Court erred over the objection of the plaintiff in granting the defendant's motion that the service of the summons and complaint be set aside and declared null, void and of no effect, in passing upon and deciding, or presuming to decide, the issue of fact which was raised by the complaint, amended complaint, affidavit of the plaintiff's attorney on the one hand, and the affidavits of Michael W. O'Boyle and Allen McCulloh for the defendant, on the other hand which raised issues of facts that should have been decided by a jury, not by this court.

VI

The Court erred after the motion came on to be heard in ordering as follows:

"Ordered that the said motion be and the same hereby is granted, and the attempted service of the summons herein, together with a copy of the complaint upon the defendant herein, by delivering the said summons and a copy thereof, together with a copy of the complaint to Michael W. O'Boyle, on the 7th day of May, 1913 at No. 80 Broadway, in the Borough of Manhattan, City of New York, State of New York, be and the same hereby is set aside and declared null, void and of no effect."

and the plaintiff excepts thereto and assigns the same as error.

75 VII.

The Court erred in granting the motion of the defendant and in failing to hold that the procurement by the defendant of an order,

under date, May 25, 1915, directing the plaintiff to file an amended complaint and the procurement by the defendant of an order, under date of May 25, 1915, granting the defendant an extension of time to appear and plead and the procurement by the defendant of an order and direction by the court that the plaintiff serve upon the defendant, copies of the answering affidavits and memorandum therein, operated as a general appearance by the defendant in this action.

VIII.

The Court erred in granting the motion of the defendant in holding that the defendant by its acts did not waive defect of jurisdiction.

IX.

That the Court erred in granting the motion of the defendant and in failing to hold that the acts of the defendant have constituted a general appearance in this action.

Wherefore the said Stanley Maisukas, the plaintiff, prays that judgment herein for the errors aforesaid and for the other errors in the proceedings on the motion and order aforesaid, may be reversed and annulled, and altogether held for nothing and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said motion and order. Dated, New York, July 27, 1915.

BALTRUS S. YANKAUS,
Attorney for Plaintiff-in-Error.

Office and P. O. Address, 154 Nassau Street, Borough of Manhattan, City of New York.

Endorsed: Assignment of Errors. Filed July 27, 1915.

76 [Endorsed:] L. 5-44. United States District Court, Eastern District of New York. L. 5-34. Stanley Meisukas, Plaintiff-in-Error, against Greenough Red Ash Coal Co., Defendant-in-Error. Copy. Pd. 10¢. Assignment of Errors. Baltrus S. Yankaus, Attorney for Plaintiff-in-Error, 154 Nassau Street, Borough of Manhattan, New York City. Filed July 27, 1915.

77 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff,
against
GREENOUGH RED ASH COAL CO., Defendant.

I, the undersigned, Thomas I. Chatfield, the Judge of this Court, before whom came the petition of the plaintiff for a writ of error to the Supreme Court of the United States, from the order made and entered in this Court on the 28th day of June, 1915, in the above entitled proceedings and having heretofore allowed the said writ of error to the said Supreme Court of the United States, I do hereby certify:—

That the question in issue on this appeal is that of the jurisdiction of this Court.

THOMAS I. CHATFIELD, *J. S. D. J.*

[Endorsed:] L. 5-44. United States District Court, Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff, against Greenough Red Ash Coal Co., Defendant. Certificate of Jurisdiction. Baltrus S. Yankaus, Attorney for Plaintiff, 154 Nassau Street, Borough of Manhattan, New York City. Filed July 28, 1915.

78 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff-in-Error,
vs.
GREENOUGH RED ASH COAL CO., Defendant-in-Error.

Know all men by these presents, That the Fidelity and Deposit Company of Maryland is held and bound unto Greenough Red Ash Coal Co. in the sum of two hundred and fifty dollars ($250), lawful money of the United States, to be paid to the said Greenough Red Ash Coal Co., its successors or assigns; for which payment, well and truly to be made, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents.

Sealed with its seal. Dated this twenty-eighth day of July, Nineteen hundred and fifteen.

Whereas, the above named Stanley Meisukas is about to prosecute an appeal to the United States Supreme Court to reverse an order of the United States District Court, Eastern District of New York, entered on the 28th day of June, 1915, dismissing the complaint; and the said Stanley Meisukas having obtained the allowance of the appeal, and filed a copy thereof in the Clerk's office of the said Court, and a citation directed to the said Greenough Red Ash Coal Co., citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days of the date thereof.

Now, therefore, the condition of this obligation is such, that if the above named Stanley Meisukas shall prosecute his said appeal to effect, and answer all costs and damages if he fail to make his said plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By JAMES R. KINGSLEY, *Attorney-in-Fact.*

Attest:
[SEAL.]

ERNEST L. HICKS,
Attorney-in-Fact.

79 STATE OF NEW YORK,
County of New York, ss:

On the 28th day of July, in the year 1915, before me personally came James R. Kingsley, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 33 of the Consolidated Laws of the State of New York. And the said James R. Kingsley further said that he is acquainted with Ernest L. Hicks and knew him to be the Attorney in Fact of said Company; that the signature of the said Ernest L. Hicks subscribed to the within instrument, was in the genuine handwriting of the said Ernest L. Hicks and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said James R. Kingsley.

[SEAL.] F. A. MASSEY,
Notary Public, New York County, No. 65.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kings-
" ley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn,
"Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and
" Frank A. Eickhoff, all of the City of New York, State of New
" York, be and each of them is hereby appointed Attorney-in-Fact
" of this Company and empowered to execute and deliver and attach
" the seal of the Company to any and all bonds or undertakings for
" or on behalf of this Company, in its business of guaranteeing the
" fidelity of persons holding places of public or private trust and the
" performance of contracts other than insurance policies, and ex-
" ecuting or gauranteeing bonds or undertakings required or per-
" mitted in all actions or proceedings, or by law required, permitted
" or allowed.

"Such bonds or undertakings to be executed for the Company by
" any one of the said Henry B. Platt, James R. Kingsley, Frank H.
" Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood,
" Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and
" to be attested in every instance by one other of the said Attorneys-
" in Fact, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, Ernest L. Hicks, Attorney-in-fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 28th day of July, 1915.

[SEAL.] ERNEST L. HICKS,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement December 31, 1914.

Resources.

Home Office Building, Charles and Lexington Streets	$2,375,000.00
Other Real Estate, 214 N. Charles St., etc.	185,137.41
Bonds and Stocks	6,008,060.50
First Mortgage Loans	229,504.02
Agents' Debit Balances, Gross (Surety)	687,525.67
Agents' Debit Balances, Gross (Casualty)	892,013.38
Re-insurance due from other Companies	70,476.86
Bank Deposits for use of Branch Offices	76,840.00
Cash in Banks and Trust Companies	1,257,938.58
Total	$11,782,496.42

Liabilities.

Reserve for Unearned Premiums		$3,388,309.15
Reserve for Claims Admitted and Unadmitted		2,019,604.24
Reserve for Agents' Commissions		384,123.90
Reserve for Premium Taxes & Expenses in Transit		130,000.00
Reserve for Unpaid Re-insurance		41,978.03
Reserves—Special and Contingent		138,841.80
Capital Stock	$3,000,000.00	
Surplus	2,000,000.00	
Undivided Profits	679,639.30	
Surplus to Policyholders		5,679,639.30
Total		$11,782,496.42

STATE OF NEW YORK,
County of New York, ss:

Ernest L. Hicks being duly sworn, says that he is the Attorney-in-fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition

of said Company, as of Dec. 31, 1914, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

ERNEST L. HICKS.

Subscribed and sworn to before me, this 28" day of July, 1915.

[SEAL.] F. A. MASSEY,
Notary Public, New York County, No. 65.

80 *Notice of Entry.*

SIR: Please take notice that the within is a true copy of a bond this day duly approved by Hon. Thomas I. Chatfield, and duly filed in the office of the clerk of the within named court at his office in the Post Office Building, Borough of Brooklyn, City of New York, Eastern District of New York.

Dated New York, July 28, 1915.

Yours, etc.,

BALTRUS S. YANKAUS,
Attorney for Plaintiff.

Office and Post Office Address, 154 Nassau Street, Borough of Manhattan, New York City.

To Alexander & Green, Attorneys for Defendant.

[Endorsed:] L. 5-44. United States District Court, Eastern District of N. Y. L. 534. Stanley Meisukas, Plaintiff-in-Error, vs. Greenough Red Ash Coal Co., Defendant-in-Error. Copy. 10c. Bond. I approve of the within Bond and of the sufficiency of the surety therein. Dated July 28, 1915. Thomas I. Chatfield, U. S. D. J. Fidelity and Deposit Company of Maryland, 2 Rector Street, New York. Filed July 28, 1915.

81 STATE OF NEW YORK,
City of New York,
County of New York, ss:

William Schaaf being duly sworn says that he is over the age of twenty-one years. That on the 28th day of July, 1915, he served a copy of the annexed citation with notice of filing and entry thereof, upon the defendant and defendant-in-error, the Greenough Red Ash Coal Co., and upon Alexander & Green, Esqs., the attorneys for the said Company by depositing the same properly enclosed in a post paid wrapper in the general post office regularly maintained by the Government of the United States in the City of New York, Borough of Manhattan, State of New York, directed to Alexander & Green, Esqs., at No. 120 Broadway, Borough of Manhattan, City of New York, said address being that designated by them for that purpose upon the preceding papers in this action.

WILLIAM SCHAAF.

Sworn to before me this 29th day of July, 1915.

[SEAL.] EDWARD T. HART,
Notary Public, Bronx County, No. 61.

Certificate Filed in N. Y. Co. No. 373, New York County Register's No. 7311.

82 UNITED STATES OF AMERICA, *ss:*

To Greenough Red Ash Coal Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's Office of the United States District Court, for the Eastern District of New York, wherein Stanley Meisukas is plaintiff-in-error, and you are defendant-in-error, to show cause if any there be, why the order made by the Judge of the District Court, Eastern District of New York, on the 28th day of June, 1915, ordering as follows:

"Ordered that the said motion be, and the same hereby is granted, and the attempted service of the summons herein, together with a copy of the complaint, upon the defendant herein by delivering the said summons or a copy thereof, together with a copy of the complaint, to Michael W. O'Boyle on or about the 7th day of May, 1915, at No. 80 Broadway, in the Borough of Manhattan, City of New York, State of New York, be, and the same hereby is, set aside and declared null, void and of no effect,"

as in the Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas I. Chatfield, Judge of the United States District Court, Eastern District of New York, this 28th day of July, in the year of our Lord one thousand nine hundred and fifteen.

THOMAS I. CHATFIELD,
Judge of the United States District Court,
Eastern District of New York.

Received and filed July —, 1915.
Dated: New York City, N. Y., July —, 1015.

——— ———,
Attorney for Defendant-in-Error.

83 [Endorsed:] L. 5-44. United States District Court, Eastern District of New York. L. 534. Stanley Meisukas, Plaintiff-in-error, against Greenough Red Ash Coal Company, Defendant-in-error. Copy. Citation. Pd. 20¢. Baltrus S. Yankaus, Attorney for Plaintiff-in-error. 154 Nassau Street, Borough of Manhattan, New York City. Filed July 29, 1915.

84 United States District Court, Eastern District of New York.

STANLEY MEISUKAS, Plaintiff and Plaintiff-in-Error,
against
GREENOUGH RED ASH COAL COMPANY, Defendant and Defendant-in-Error.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

I, Percy G. B. Gilkes, clerk of the District Court of the United States, for the Eastern District of New York, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing is a true transcript of the writ of error, summons and complaint, amended complaint, affidavit and order to show cause, answering affidavit on behalf of the plaintiff, replying affidavit on behalf of the defendant, order adjourning the hearing upon the order to show cause upon certain conditions, notice of settlement of order, order granting defendant's motion and setting aside and declaring null, void and of no effect the service of the summons herein, together with a copy of the complaint upon the defendant, the petition and order for writ of error, assignment of errors with prayer for reversal, certificate of juisdiction, the bond, and citation and proof of service thereof, being the record and proceedings in said Court in the above entitled cause as the same remain of record and on file, being the papers made up to be transmitted to the Supreme Court of the
85 United States, on writ of error on the plaintiff in the suit wherein Stanley Meisukas is plaintiff and Greenough Red Ash Coal Company is defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of August, 1915.

[Seal District Court of the United States, Eastern District of New York.]

PERCY G. B. GILKES, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Aug. 19/15. P. G. B. G.]

[Endorsed:] United States District Court, for the Eastern District of New York. Stanley Meisukas, Plaintiff in error, against Greenough Red Ash Coal Company, Defendant in error. Transcript of record.

Endorsed on cover: File No. 24,893. E. New York D. C. U. S. Term No. 229. Stanley Meisukas, Plaintiff in Error, vs. Greenough Red Ash Coal Company. Filed August 25th, 1915. File No. 24,893.

Supreme Court of the United States

October Term, 1916.

No. 229.

STANLEY MEISUKAS,
Plaintiff-in-Error,
against
GREENOUGH RED ASH COAL COMPANY,
Defendant-in-Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

ALVIN C. CASS,
Attorney for Plaintiff-in-Error,
68 William Street,
New York City.

BALTRUS S. YANKAUS and
FRANK J. FELBEL,
of New York City,
on the Brief.

INDEX.

CASES CITED.

Supreme Court of the United States

STANLEY MEISUKAS,
Plaintiff-in-Error,

against

GREENOUGH RED ASH COAL COMPANY,
Defendant-in-Error.

Statement.

This is a Writ of Error (p. 1) to the United States District Court for the Eastern District of New York, and brings up for review the question of the jurisdiction of that court as certified by one of its Judges (pp. 42-43) following the Assignments of Error (pp. 38-42, inclusive).

The parties will be referred to as they appeared in the Court below.

This was a transitory action at law to recover damages for personal injuries, and was commenced in the District Court of the United States for the Eastern District of New York.

The complaint alleged that the plaintiff was a citizen of the State of New York and a resident of the Eastern District of New York, and that the defendant was a foreign corporation and a resident and citizen of the State of Pennsylvania, but was doing business and owned property in the State of New York (p. 2).

The summons and complaint were served upon Michael W. O'Boyle, the president of the defendant company, in the Borough of Manhattan, City, County and State of New York, in the Southern District of New York, on the 7th day of May, 1915 (p. 14). The defendant's time to answer the complaint would have expired on the 27th day of May, 1915. No steps were taken by the defendant until the 26th day of May, 1915, when motion papers were served upon the plaintiff's attorney, upon the affidavit of Michael W. O'Boyle, verified on that day, and upon the summons and complaint in the action (p. 13), returnable on the same day, at two o'clock in the afternoon, for an order setting aside the service and declaring it null, void and ineffectual on the two grounds stated in the order, to wit: First, that the defendant company being a corporation, organized under the laws of the State of Pennsylvania and transacting no business within the State of New York, nor the Eastern District of New York, having no office or place of business with the said State or district, and having no property within the said State or district, could not legally be made a defendant in said State or district by the service upon one of its officers while temporarily in said State of New York, and secondly, that the service was made outside of the territorial limits of the Court (p. 14).

The motion was brought on by an order to show cause obtained by the defendant from Hon. Thomas I. Chatfield, District Judge, on the 26th day of May, 1915, and the order to show cause contained the following words:

> "And why the defendant should not have such other and further order or relief in the premises, as to the court may seem proper."

The order to show cause and affidavit were served upon the plaintiff's attorney after 12 o'clock noon on the day on which it was returnable (p. 27). For this reason it was obviously necessary for an adjournment to be granted, and the defendant's attorneys, anticipating this upon the argument of the motion, raised no objection to the adjournment, but insisted that as a condition of the adjournment the plaintiff file affidavits or so amend his complaint as to show positively whether or not he was an alien or a citizen of the United States, and if a citizen, how and in what manner his citizenship was acquired (p. 28).

The contention that the plaintiff was not actually a citizen of the United States was made by the defendant's attorneys, for the first time, on the argument. No motion of this point was made in the defendant's moving papers. After considerable argument the adjournment was granted, and also the demand of the defendant that such an amended complaint be served. There was, moreover, granted to the defendant, at its request, without any consent of or on behalf of the plaintiff, an extension of time until ten days after the determination of the motion within which the deefndant appear generally and answer, plead or otherwise move.

The full terms of the order which resulted from this preliminary argument appear at page 12. It will be observed that this order contains three essential parts: Firstly, it adjourned the hearing upon the order to show cause, secondly, as a condition of such adjournment it extended the time of the defendant to appear generally, answer, plead or otherwise move, and thirdly, it ordered the plaintiff within six days to file an amendment

or amended complaint, showing whether the plaintiff was an alien or citizen of the United States. A copy of this order with notice of entry was served upon the plaintiff's attorney by the defendant's attorneys, purporting to appear specially, on the 28th day of May, 1915 (p. 28).

Upon further investigation by the plaintiff's attorney, due to the insistence of the defendant's attorney that the plaintiff was an alien, it developed that he had not yet acquired full citizenship, but had only filed his first papers. These facts were embodied in an amended complaint which appears at page 17, which was filed in this action.

The essential facts are admitted by the defendant, as appears from the affidavit in reply to the plaintiff's affidavit at page 32. The only additional facts gathered from this affidavit, are that the order served on the plaintiff's attorney by the defendant's attorneys had been prepared in advance by the defendant's attorneys, and contained therein an extension of time demanded by them. but that the requirement that the plaintiff should state whether he was an alien or citizen was inserted by Judge Chatfield and was at his own suggestion. It is obviously immaterial who suggested the requirement that the plaintiff serve an amended complaint. The defendant adopted and ratified the act of the Judge when it served upon the plaintiff's attorney a complete copy of the order, with notice of entry. The motion finally came up for argument before Hon. Van Vechten Veeder, District Judge, and resulted in an order setting aside the service of the summons, which appears on page 35. From this order a Writ of Error issued to this Court (p. 1).

In order for this Court to appreciate the full facts and circumstances of this case, which is typical of an increasingly large class of cases, it is necessary to refer to certain details not entirely relating to the legal point involved. This much, however, should be said, so that this Court in passing upon a question of somewhat novel impression may be guided by the broad principles of right and justice, as well as by the narrower and more technical points which are raised on behalf of the plaintiff.

The plaintiff was a miner employed in the coal fields of Pennsylvania by the defendant corporation. In the course of his duties there occurred an explosion of dynamite which resulted in injuries so terrible that it scarcely seems possible a person could survive them. A description of these injuries—loss of both arms, complete destruction of one eye and both ears and partial destruction of the other eye—appear at page 3 of the record. They are interesting for the purpose of pointing out the good faith of the plaintiff throughout this action, a good faith which will undoubtedly be challenged by the defendant's attorneys in their somewhat frantic endeavor to relieve their client of a liability which could not fail to mount up into many thousands of dollars. When the plaintiff was permitted to leave the hospital he was brought to Brooklyn, in the Eastern District of New York, and there cared for by his family and friends. Obviously it was extremely difficult for his attorney to gather the full facts from a man totally deaf and half blind and lacking in both arms. Somehow he conveyed the impression to his attorney hat he had completed his application for citizenship and that his final papers had been

granted. Upon further conversation, after the argument of the defendant's attorney, plaintiff's attorney discovered that only the first papers had been obtained. This accounts for the discrepancy between the original complaint and the amended complaint.

Plaintiff being a resident of the Eastern District of New York, and as his attorney believed a citizen, and the defendant being a Pennsylvania corporation, the United States District Court for the Eastern District of New York was a logical place for the commencement of the action. The summons, however, was served within another district. There is respectable authority for upholding the contention of the plaintiff's attorney, that this service is good, but it need not be considered in the present case as the defendant has obviously waived this point by insisting that it could not be sued at all in the Eastern District of New York, since it was doing no business and had no property there. It is alleged in both the original and amended complaint that the defendant does business and has property within the State of New York, and within the Eastern District of New York (pp. 2, 17). These allegations are not denied by any answer or plea on the record, but there are statements in the affidavits read in support of the motion, to the effect that the defendant does no business and has no property within the State of New York, and that the defendant was served in that state while present on his private business (p. 15). What this private business was is not stated. There is no doubt that if these were the facts the defendant would not be liable under the decisions of this Court, to suit in either the State or Federal Courts within the State of New York,

but the plaintiff's attorney did not and does not believe that these are the facts. He alleged in his affidavit on page 29 that he has reason to believe the defendant does business within the State of New York, through its agent, the Susquehanna Coal Company.

The difficulties which confront a plaintiff's attorney in penetrating the mazes of corporate existence must be well known to this Court. The facts necessary to prove that the defendant did business within the State of New York were naturally not readily discoverable. For the most part, these facts were known only to the defendant's representatives, and the representatives of associated corporations. The unfair method of testing out this question on affidavits by means of a preliminary motion is thus apparent. Had the defendant been compelled to interpose a plea or answer which could have been brought on for trial or hearing with sworn testimony, the plaintiff would have had his opportunity to examine representatives of the companies and perhaps elicit the information which he believed to be true. No such opportunity was afforded him, and the record, therefore, discloses no facts from which this Court can assume that the defendant was actually doing business within the State of New York and within the Eastern District of New York. The plaintiff is, therefore, compelled by reason of the advantage thus taken of him to fall back on the technical claim that the defendant by various acts has waived its rights to take advantage of its insistence that it cannot be subject to suit within the State of New York, because it does no business and has no property there, a conten-

tion which the plaintiff's attorney does not believe, but could not at the time disprove.

This brief will, therefore, be confined to a discussion of whether or not the acts of the defendant brought it into court and conferred jurisdiction.

POINT I.

By moving upon the summons and complaint, and by procuring and adopting the original order to show cause, and the second order requiring the plaintiff to serve an amended complaint, and extending the time of the defendant to answer, the defendant waived all rights which it may have had to object to the venue of the action or the place of service, and constituted a general appearance by the defendant and a submission to the jurisdiction of the Court.

It should be observed at the outset that the record clearly discloses a state of facts which give the United States Courts jurisdiction of the subject matter of the action. The original complaint states that the plaintiff is a citizen of the State of New York, and the defendant, a foreign corporation, organized under the laws of the State of Pennsylvania, and a citizen of that state (p. 2). The amended complaint states that the plaintiff is an alien and subject of the Czar of Russia, and that the defendant is a foreign corporation, organized under the laws of the State of Pennsylvania,

and a citizen of that state (p. 17). So in any event there can be no question about the jurisdiction of the United States District Court, for the Eastern District of New York, over the subject-matter of the action. The sole remaining questions are of venue and of service.

The distinction was clearly pointed out in the case of *Interior Construction Co.* vs. *Gibney*, 160 U. S., 217, where the Court said, at page 219:

> "The Circuit Courts of the United States are those vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court of its own motion will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a proceeding between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege which the defendant may insist upon or may waive, at his election."

When the defendant's president was originally served with the summons there were, therefore, several courses open to him. The summons was served in the Southern District and the action was brought in the Eastern District.

The defendant's attorneys contend that this service was bad, and had they relied solely on this point and taken no other steps and asked for no

other relief, if the Court had agreed with them in that contention, the service would have been set aside. But they went further and claimed that the service should be set aside on the second ground, namely, that the defendant was doing no business and had no property within the State of New York. It was of course immaterial, if the summons were never served so as to give the Court jurisdiction, whether the defendant did or did not transact business in the State of New York, or in the Eastern District of New York, and when the defendant asked the Court to pass upon this second and more important question, there can be no doubt that it appeared for that purpose at any rate, and that the objection to the place of service was thereby waived. This seems so obvious in view of the decisions of this Court that no further mention will be made of that point. The cases, however, which are cited for the proposition that the defendant has waived its rights to raise the second point by other steps which it has taken, of course, apply with the same force and effect to the first point with regard to service of process. The contention, based upon several decisions of this Court, that a foreign corporation cannot be sued in a state in which it transacts no business amounts to no more than this: That a foreign corporation is held not to be present in a state so as to give a Court jurisdiction over it invitum unless it transacts business there. This, of course, in no way prevents such a corporation from voluntarily or inadvertently giving the Court jurisdiction of its person.

There is no question that if the defendant had appeared generally and answered and gone to

trial, that all defects would have been waived, and that a judgment for the plaintiff would stand. The question now is whether the defendant, by seeking and obtaining relief from the Court, other than the particular relief of setting aside the service on the grounds stated by it, appeared generally and waived its rights in the same manner.

The following acts were committed by the defendant and are totally unrelated to the question of whether or not the Court should set aside the service of the summons and complaint on the second ground stated in the defendant's moving papers, that it does no business within the State of New York, or the Eastern District of New York.

(1) The defendant applied to the Court for an order to show cause, thereby invoking the jurisdiction of which it was seeking to be relieved.

(2) The defendant made its original motion upon the summons and complaint.

(3) The defendant requested in its moving papers that the Court grant it such other and further order or relief as might be just in the premises.

(4) The defendant applied for and obtained or at least adopted and made use of an order of the Court, compelling the plaintiff to file and serve an amended complaint, showing whether or not he was an alien or a citizen, and

(5) The defendant applied for and obtained an order from the Court, extending its time to ap-

pear generally, answer, plead or otherwise move.

These acts of the defendant are referred to in the Assignments of Error No. 7, 8, and 9 at page 41 of record.

It will be observed that when the summons and complaint were served originally, the defendant had twenty days within which to answer or take such other step as it might be advised. It waited nineteen days before doing anything, and it then sought the aid and assistance of the Court, whose jurisdiction it was endeavoring to throw off, and procured from this Court an order directing and requiring the plaintiff to show cause. If the Court had jurisdiction to grant this relief to the defendant, it had jurisdiction to grant the relief which the plaintiff required, and there is no justice in permitting the defendant to deny with words the jurisdiction of the Court over its person and at the same time invoke that jurisdiction for its own purpose, and then claim that it has safeguarded itself by reason of the words "appearing specially" with which its attorneys have arrayed themselves.

The original order to show cause, which appears at page 13, commences as follows: "On reading the summons and complaint in this action." In other words, the motion was made and based upon the summons and complaint. In spite of this fact the grounds stated by the defendant for the making of the motion was solely that the summons was served outside of the district, and the defendant did no business within the State of New York. Neither of these contentions are in any way related to the subject-matter of the action or based upon the allegations of the complaint, but read in connection with the prayer of the defendant for other and further relief, there is revealed an at-

tempt to attack by motion, the complaint in this action. This is clearly a step beyond that which was necessary for the defendant to take in order to obtain the relief which it sought, and raises a possible question as to the merits of the controversy.

The order to show cause provided that the plaintiff must show why the defendant should not have such other and further relief as might be just. What other and further relief could the defendant want? There are numerous branches of relief to which a defendant may be entitled. He might ask that the complaint be made more definite and certain; that the plaintiff be required to serve a bill of particulars; that scandalous or irrelevant matter might be striken from the complaint; in other words, numerous grounds of relief in no way connected with the sole ground of relief to which the defendant might have been entitled, namely, the setting aside of the service of the summons.

The plaintiff was haled into court and directed to be prepared to show cause why the defendant should not have any sort of relief to which it might claim it was entitled. It is intolerable that a defendant can thus trifle with the juridiction of the court over its person. And that this cannot be regarded as a purely formal and meaningless part of the motion papers is apparent when it is observed that the defendant did actually either apply for or acquiesce in and adopt an order of the Court which was practically a requirement that the complaint be made more definite and certain by stating whether or not the plaintiff was an alien or a citizen. This was a question which was not raised by the defendant in its motion papers,

except in so far as it asked for other and further relief, and when it served upon the plaintiff's attorney the order with this provision therein contained, it clearly adopted it and made use of it and thereby waived the original contentions which were made by it on its motion.

These points seem to follow naturally from the decisions of this Court involving the subject of waiver, but precise authority for them is naturally lacking; but the one thing which the defendant did, which brings it directly in line with numerous decided cases was to obtain an extension of time within which to answer, plead or otherwise move. Both the state and federal courts have been practically unanimous in holding that such an act on the part of a defendant is a waiver of its rights to have the service set aside or to object to the venue of the action, and constitutes a general appearance, bringing it into court for all purposes. The justice and wisdom of this rule can hardly be questioned. A motion to set aside the service is almost invariably a highly technical one. There is usually no reason why the defendant cannot litigate in the place of the plaintiff's choice as well as elsewhere. In the present case, if the plaintiff were compelled to go to another jurisdiction he would probably die while attempting to do so. He is a resident of the district in which he commenced his action, and it would seem logical that he should be permitted to maintain it there. So if the defendant has any objection to the court of the plaintiff's election, it should be confined strictly and solely to the raising of that objection. If the objection is sustained the case is thrown out of court. If the objection is overruled the plain-

tiff is permitted to proceed with the action. There is no reason or justice in permitting a defendant to urge upon the Court that jurisdiction of its person was never obtained, while at the same time it protects itself with the aid of that very court from the consequences of an adverse decision.

A very similar case was *Murphy* vs. *Herring-Hall-Marvin Safe Co.*, 184 Fed., 495. In that case the defendant obtained in the state court an ex parte order extending the time for answering, appearing, moving or otherwise pleading to the complaint. After the cause was removed to the District Court of the United States, the defendant sought by motion to vacate the service of the summons on the ground that jurisdiction of its person had not been obtained. The motion was denied, the Court saying:

> "It is contended by plaintiffs, and I think correctly, that in applying for and obtaining this order the defendant must be held to have submitted itself to the jurisdiction of the state court and to have thereby estopped itself from now urging any objection to the regularity of the service of the process. The making of an order in a cause is an exercise of jurisdiction therein, and jurisdiction may be exercised only at the instance of a party; that is, it must appear and ask it. When, therefore, one applies to a court or judge for an order granting him relief of any character, and an order for time in which to do an act is a grant of relief, he necessarily appears for that purpose" (citing *Curtis* vs. *McCullough*, 3 Nev., 202; *Ayres* vs. *Western R. R.*, 48 Barb., N. Y., 132).

The Court further on in its opinion said:

> "Nor need an appearance to conclude a party for the purpose here involved be made in any specific manner. Any act which in its legal effect submits one to the jurisdiction of the court is sufficient although the statute may prescribe a particular method for other purposes."

The Court quotes the language of this Honorable Court in the case of *Wabash Western R. R.* vs. *Brow*, 164 U. S. 271, as follows:

> "An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant, *even when not in fact intended.*"

And the Court in concluding its opinion and decision in the case of *Murphy* vs. *Herring-Hall-Marvin Safe Co.* (supra), said:

> "In other words the effect is not to be deduced from what the party may have intended but from what he did. It is the act which speaks and not the secret purpose. A party cannot avail himself of the benefit of such a step and then be heard to say that it shall not be given the usual and ordinary effect of like proceedings because he did not so intend."

In the case of *Mahr* vs. *Union Pacific R. R. Co.*, 140 Fed. Rep., 921, the facts were as follows:

Plaintiff brought his action for personal injuries alleged to have been sustained upon defendant's railroad, while en route from Denver to Walla Walla. Service was made upon one Robert Burns, general agent of the Oregon Railroad and Navigation Co., at Walla Walla. Defendant moved to quash the service of summons. It seems that defendant's notice of motion consisted of four paragraphs. The third paragraph contained a challenge to the Court's jurisdiction over the subject matter of the action.

The contention of the plaintiff in opposition to the motion to quash service of summons was that by reason of such challenge that defendant had made a general appearance and submitted itself to the jurisdiction of the Court. In its decision, commenting on this feature of the case, the Court said:

> "The right to make a special appearance is not a substantial one inherently existing; it is a privilege allowed by practice, and it must be exercised under the rules of procedure. Whenever a litigant appears to deny jurisdiction over his person, which would otherwise exist but for the failure to pursue the method prescribed by law for bringing him into court, he must *confine himself to that particular branch of jurisdiction.* It is a matter of indifference to him whether or not the Court has jurisdiction of the *subject matter;* so long as it has no jurisdiction over his person, it cannot in any way injuriously affect his interest. *He must, therefore, be content to stop with the suggestion that the summons or notice as the case may be, required by the law*

to be served, has not been served, and that the Court is, therefore, not entitled to deal with him in the absence of such service. As to the complaint he need give himself no concern. If he does, in a transitory action, and enters upon a discussion of that question or makes a challenge as to that point, he waives the want of service and enters voluntarily into a controversy which goes to the merits, and thereby submits to the jurisdiction of the Court over his person."

The Court went on to say at page 923:

"The action is therefore transitory, and the question arises whether there has been a general appearance by the defendant. To resolve that question we must consider the language used. To say that 'the subject matter of the same was not and never has been and is not now within said State of Washington' is equivalent to a demurrer that the Court has no jurisdiction of the subject matter of the action, under subdivision 1, Sec. 4907, Ballinger's Ann. Codes & Stat., for it is said in effect: First. The cause of action arose in the State of Wyoming, the courts of that state therefore have and this court consequently cannot have jurisdiction. Second. The defendant is not engaged in business in this state, has no agent here upon whom service of process can be made, and the suit can only be prosecuted in the State of Utah where the defendant has its home office, therefore the courts of Utah have and this court cannot have jurisdiction. These objections both go

> to the subject matter, for it is not denied that the court has jurisdiction if the defendant be properly brought into court. The following authorities sustain plaintiff's contention that the language used by the defendant in its motion constitutes a general appearance" (citing *Fitzgerald Construction Co.* vs. *Fitzgerald*, 137 U. S., 98 and other cases).

In *Fitzgerald* vs. *Fitzgerald*, above cited, this Honorable Court held and decided:

> "By the amendment to its answer, its plea and motion, the defendant insisted that the Court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service, and submitted itself to the decision of the Court in respect to jurisdiction over the subject matter, which jurisdiction, it is entirely clear the Court possessed. These proceedings were taken by a defendant after discovering the alleged ground of objection to the service, and there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances admits of no doubt, and the rule to that effect seems well settled in Nebraska, Kansas and Ohio, which all have similar codes."

In *Southern Pacific Co.* vs. *Denton*, 146 U. S., 205, the plaintiff was a citizen of Texas residing in the Eastern District thereof, and the defendant was a corporation incorporated by the laws of Kentucky, a citizen of that state, and a resident of the Western District of Texas, doing business and

having an agent in said District. One of the questions presented on the review of the case by this Honorable Court was the question whether the defendant, the railroad company, had appeared generally in the action, and in the course of its opinion, the Court said:

> "It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally, or by answering to the merits of the action without first objecting to the jurisdiction."

In further support of our contention that the acts of defendant in the case at bar, its procurement of the order to show cause and its acceptance and entry of the second order of the 26th day of May, 1915, constituted a general appearance by it. We respectfully invite attention to the following decisions:

In the case of *Hupfeld* vs. *Automaton Piano Co.*, 66 Fed., 788 (C. C. S. D. of N. Y., April 6, 1894) Judge Lacombe, in his opinion said:

> "In this case a motion was made to set aside the service of the subpoena *ad respondendum,* and to dismiss the appeal on the ground that this court has no jurisdiction of the defendants or either of them. The defendant Piano Company has obtained an extension of time to plead, answer, demur or take such other action as it may be advised. This is the equivalent of a general appearance, and the motion to dismiss, as to it, is therefore denied."

That which the defendant asked for and obtained in the case last cited, is identical with the relief asked for and obtained in the case at bar.

In *Briggs* vs. *Stroud*, 58 Fed., 717 (C. C. E. D. of Wis., November 25, 1893) it was said:

> "An appearance by an attorney, so as to secure an extension of time to plead or answer, is a general appearance, taken as special to plead to jurisdiction."

In *Kneeland* vs. *Martin et al.* (N. Y. Law Bulletin, May, 1890), the Court held as follows:

> "An order extending the defendant's time to answer, is equivalent to a notice of appearance, particulodly if the usual affidavit of merits is served with the order containing the extension of time" (citing Quinn vs. Tilton, 2 Duer, 649).

In *Krause* vs. *Averill*, 66 How. Prac., 97, it was held as follows:

> "An order extending time to answer is equivalent to a notice of appearance."

In *Midland Contracting Co.* vs. *Toledo Foundry & Machine Co.*, 154 F., 797, the Court said:

> "The right of a defendant, sued in a federal court, on the ground of diversity of citizenship, to object to the jurisdiction of the court because neither party is a resident of the district, is waived by his entering a general appearance and asking for an extension

of time in which to plead, and for a continuance, prior to the making of such objection."

In *Gaines* vs. *Travis*, Fed. Cases, No. 5179, the Court said, at page 1061:

"Had the respondent rested upon his rights, the Court must have set aside the proceedings as wholly irregular, and the entry of the order of reference as nugatory. But as he only appeared upon the reference on due notice thereof, and consented to adjournments ordered by the Commissioner, he must be held to have waived irregularity and to have assented to the reference."

To the same effect see

Lebensberger vs. *Soofield*, 138 Fed., 380.
Yale vs. *Edgerton*, 11 Minn., 271.
Coffee vs. *Chippewa Falls*, 36 Wis., 121.
People vs. *Haughton*, 41 Hun (N. Y.), 558.
Montague vs. *Movunda*, 71 Neb., 805.
Bazzo vs. *Wallace*, 16 Neb., 290.
Baisley vs. *Baisley*, 113 Mo., 544.
Borden vs. *Fowler*, 14 Ark., 471.
State Bank vs. *Walker*, 14 Ark., 234.
St. Louis Railway Co. vs. *Barnes*, 35 Ark., 95.
Rogers vs. *Conway*, 4 Ark., 70.
Auspach vs. *Ferguson*, 71 Iowa, 144.
Lane vs. *Leach*, 144 Mich., 163.
Shaffer vs. *Trimball*, 2 Greene (Iowa), 464.
Davidson vs. *Graham*, 25 Cal., 484.
Tagert vs. *Fletcher*, 232 Ill., 197.

As to the decisions of this Court, they are numerous on the point that a defendant waives his right to object to the jurisdiction of the Court over his person or to the venue of the action, by taking any steps other than those necessary for the establishment of the particular remedy which he seeks, namely, the setting aside of the service.

So in *Thames Insurance Co.* vs. *United States*, 237 U. S., pages 18, 19, the Court said:

> "While the Government asserted in its demurrer that it appeared specially, it raised by that pleading not simply the question of the jurisdiction of such a suit against the United States but also that of the merits. * * * Such a demurrer is, in substance, 'a general appearance to the merits' and is a waiver of objection with respect to the district in which the suit was brought."

To the same effect see the decision of this Court in *Western Loan & Savings Co.* vs. *Butte Mining Co.*, 210 U. S., 368, where the defendant, purporting to appear specially, demurred on the grounds that the Court had no jurisdiction over the person of the defendant or over the subject matter of the action, and that the complaint did not state a cause of action, and that it was indefinite and uncertain. The Court held that the objection to the jurisdiction over the person was waived, saying at page 372:

> "We are of opinion that the defendant had waived objection to the jurisdiction over its person, and by filing a demurrer on the grounds stated, submitted to the jurisdiction of the Circuit Court."

See also *In re Moore*, 209 U. S., 490. In that case the defendant removed the action from the State Court, and thereafter the plaintiff filed in the Federal Court an amended petition and stipulations for continuance, and an extension of time were had. Thereafter the plaintiff moved to remand, which motion was denied. Plaintiff thereupon applied for mandamus to this Court. The Court denied the writ, saying, at page 496:

> "After the removal the plaintiff, instead of challenging the jurisdiction of the United States Court by a motion to remand, filed an amended petition in that court, signed a stipulation giving time to the defendant to answer, and then both parties entered into successive stipulations for a continuance of the trial in that court. Thereby the plaintiff consented to accept the jurisdiction of the United States Court, and was willing that his controversy with the defendant should be settled by a trial in that court. The mere filing of an amended petition was an appeal to that Court for a trial upon the facts averred by him as they might be controverted by the defendant. And this, as we have seen, was followed by repeated recognitions of the jurisdiction of that Court."

And, again, at p. 506, the Court said:

> "So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed

> from a State Court; and, if any objection arises to the particular Court which does not run to the Circuit Courts as a class, that objection may be waived by the party entitled to make it."

Surely the acts of the plaintiff in the last mentioned case could no more be considered as waivers of the right to object to the particular court in which the action was brought than the acts of the defendant in the present case. Comparing them it would seem that the present defendant has more seriously violated the rule that a party appearing specially for the purpose of ousting the court of jurisdiction over its person, must take no step beyond that necessary for him to obtain the relief he is seeking. In the Moore case the plaintiff filed an amended petition in the United States Court. In the present case the defendant demanded that the plaintiff file an amended complaint in the United States Court. In the Moore case the plaintiff granted the defendant an extension of time to answer and entered into stipulations for a continuance. In the present case the defendant obtained from the Court an order to show cause, and an order granting it an extension of time to answer. Moreover, the defendant moved upon the summons and complaint, and sought other and further relief than the mere setting aside of the summons.

On this point the language of this Court is significant in the case of *Texas & Pacific Railway Co.* vs. *Hill*, 237 U. S., 208. In that case an action was brought in the State Court of Texas, and removed by the defendant to the United States

Court. At the same time a paper was filed by the defendant containing four separate paragraphs, the first of which attacked the jurisdiction of the Court over its person, and the second, third and fourth referred to the merits of the controversy. The plaintiff thereafter moved to remand, and the motion was denied. Thereafter the defendant made a written application for a continuance, and the application was granted. The case was tried and from the judgment in favor of the plaintiff the defendant appealed. In signing the bill of exceptions the lower Court said, in part, at p. 212:

> "After the motion to remand to the State Court was overruled at the December Term, defendants made an application in writing for a continuance upon the ground that certain witnesses were necessary for a proper defense on the merits of the case. This motion was granted and the cause continued to the May Term, 1913."

In commenting upon this statement, this Court said, at p. 214:

> "Without intimating in any degree that the contention as to want of jurisdiction was well founded on its merits, we think the correctness of the action of the Court in overruling it is manifestly clear from the statement we have reproduced, made by the Court in signing the bill of exceptions, and in consideration of the state of the record, which we have recapitulated, that no further reference to the step need be made."

POINT II.

The question of the jurisdiction of the Court over the person of the defendant can be raised only by demurrer or answer, and not by motion, under the rules of practice and procedure prevailing in the courts of record of the State of New York, which the District Court was bound to follow.

Sec. 914 of the Rev. Stat. of the United States, known as the "Conformity Act," provides in part as follows:

> "The practice, pleadings and forms and modes of proceeding, in civil causes, other than equity and admiralty causes, in the District Courts, shall conform, as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such District Courts are held, any rule of court to the contrary notwithstanding."

This statute was construed by this Court in *Amy* vs. *City of Watertown*, 130 U. S., 301, and it was there held that the mode of service of process in common law actions was covered by the above statute, the Court saying:

> "But the Statute of 1872 is peremptory and whatever belongs to the three categories of practice, pleadings and forms and modes of proceeding, must conform to the state law and

> the practice of the State Courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the Act of Congress is to be followed in preference to the laws of the state. With regard to the mode of serving mesne process upon corporations and other persons Congress has not laid down any rule; and hence the state law and practice must be followed. *There can be no doubt, we think, that the mode of service of process is within the categories named in the act.* It is part of the practice and mode of proceeding in a suit."

Further on in its decision in the case last cited, the Court said:

> "Here we are bound by statute; and not by the state statute alone, but by the act of Congress, which obliges us to follow the state statute and state practice. The Federal Courts are bound hand and foot and are compelled and obligated by the Federal Legislature to obey the state law."

And in the case of *Southern Pacific Co.* vs. *Denton*, 146 U. S., 210, this Court held that under the Conformity Act, the state law must be followed as to the method of objecting to the jurisdiction of the Court, saying:

> "Under this act the Circuit Courts of the United States follow the practice of the Courts of the state, in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction."

To the same effect see

Chemung Bank vs. *Lowery,* 93 U. S., p. 72.
Bond vs. *Dustin,* 112 U. S., 604.
Glenn vs. *Sumner,* 132 U. S., 152.

It follows, therefore, that if the procedure adopted by the defendant did not conform to the requirements of the law of the State of New York that the motion to set aside the service should have been denied. The New York Code of Civil Procedure, Sec. 487, provides:

> "The only pleading on the part of the defendant is either a demurrer or an answer."

Sec. 488 provides that the defendant may demur to the complaint where it appears upon the face thereof:

> "1. That the Court has not jurisdiction of the person of the defendant.
>
> 2. That the Court has not jurisdiction of the subject of the action."

Sec. 498 provides:

> "Where any of the matters enumerated in Section 488 of this Act, as grounds of demurrer, do not appear on the face of the complaint, objection may be taken by answer."

Sec. 499 provides:

> "If such an objection is not taken, either by demurrer or answer, the defendant is deemed

to have waived it; except the objection to the jurisdiction of the Court, or the objection that the complaint does not state facts sufficient to constitute a cause of action."

Sec. 421 provides:

"The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in Section 417 of this act, concerning the office address of the plaintiff's attorney."

Under Section 499 of the Code of Civil Procedure, and under Section 421, the defendant's proper steps would be to raise the question of jurisdiction by answer or demurrer. The defendant failed to so do, and under Section 499 it is deemed to be waived.

Nowhere in the Code, or in any of the Statutes of the State of New York is there any provisions for the raising of the objection of the jurisdiction of the Court by a motion.

But under the rule of common law the defendant had a right to appear specially and test the question of the validity of service of summons by making a motion. In this case the defendant, instead of making a motion, got an order to show

cause, and in its order attacked the validity of service of summons, attacked the jurisdiction of the Court over the person of the defendant, and sought other and further relief, and did not raise the question of jurisdiction by answer or demurrer, as provided by the Code, Section 499.

In the case of *Atlantic & Pacific Telegraph Co.* vs. *Baltimore & Ohio R. R.*, 87 N. Y., 355, an action was brought for an injunction. A motion was made by the defendant to set aside the service of the summons on the grounds:

1. That the service on the president of the company was obtained by trick.

2. That the Court did not acquire jurisdiction over the defendant by the delivery of the summons to Garrett.

3. That it was apparent on the face of the papers that the Court had no jurisdiction of the case, and that the preliminary injunction was defective and void.

The Court held that on a motion to set aside the service of the summons, the legality and the regularity of the service were the only points to be considered and that the question of the jurisdiction of the Court does not properly arise on such a motion; that this objection must be taken by demurrer or answer.

To the same effect is the case of *Manning* vs. *Canadian Locomotive Co.*, 120 A. D., 735. Here there was an action by a foreign corporation against another corporation, and the complaint

failed to allege whether the defendant was a foreign or a domestic corporation. It set forth the making of a contract, but not the place where the contract was made. The defendant appeared specially and moved to set aside the service which had been made upon a general agent within the State of New York, and set up in affidavits that the defendant was a foreign corporation, and that the cause of action arose out of the state, and that, therefore, the Court had no jurisdiction under Section 1780 of the Code. Some of these allegations were controverted in answering affidavits of the plaintiff.

The Court held that the question could not be tried out on affidavits and that the only question raised by this motion was the regularity of the service which, as in this case, was obviously properly made. The Appellate Division of this Department reversed the order of the Supreme Court, setting aside the service of the summons.

The case of *Barber* vs. *Barber,* 137 A. D., 665, at p. 667, is also very much in point. Here there was an action for separation. The complaint alleged that the plaintiff and defendant had married out of the state, but resided here for one year, but that the plaintiff was still resident. Summons was served by publication, and the defendant moved to vacate the service of the summons on an affidavit, stating,

1. That he had never been a resident of New York, and

2. That the parties had been divorced in another state.

The Supreme Court of this County granted the motion of the defendant to set aside the service. On appeal to the Appellate Division this order was reversed, the Court saying:

> "It is well settled that jurisdictional questions must be disposed of in an orderly way and after a proper trial; all the issues cannot be decided, and the plaintiff's rights decided merely upon the affidavits. * * * When a complaint upon its face shows facts which demonstrate that the Court has no jurisdiction of the subject matter of the action, or of the parties, then the proper practice is to demur; if, on the other hand, the facts which deprive the Court of jurisdiction either of the subject matter or the parties, do not appear upon the face of the complaint, then the only remedy is by answer."

The same principle was set forth in the case of *Johnson* vs. *Adams Co.*, 14 Hun, 89, and again in the recent case of *Mallory* vs. *The Virginia Hot Springs Co.*, 157 A. D., 253, where the Court said, at page 256:

> "The proper method of raising the question of jurisdiction is by demurrer or answer, and not by motion."
>
> *Cushing* vs. *Laird*, Fed. Case No. 3508, at page 1023.

Last paragraph of the opinion, the Court says:

> "I have no doubt of the jurisdiction of this Court in this case, acquired in the manner referred to. If I regarded it as doubtful I should not be willing, in view of the weight

of authority in favor of it, to set aside attachments on motion. So grave a question as that of jurisdiction ought not to be disposed on motion, but ought to be presented by the pleading or at the trial, and in a formal manner. *Dennistoun* vs. *Draper,* case No. 3804; *Cartwright* vs. *Othellow* (Id. 2483) Motion denied."

POINT III.

The order of the District Court for the Eastern District of New York, vacating the summons, and declaring it null, void and ineffective, and also setting aside and declaring null, void and ineffective the attempted service of summons, should be reversed with costs and the said Court directed to re-instate the summons, assume jurisdiction and proceed with the action.

Respectfully submitted,

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on the Brief.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 229.

STANLEY MEISUKAS,

Plaintiff-in-Error,

against

GREENOUGH RED ASH COAL COMPANY,

Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-IN-ERROR.

CHARLES W. PIERSON,
CLIFTON P. WILLIAMSON,
Of Counsel for Defendant-in-Error.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 229.

STANLEY MEISUKAS,
Plaintiff-in-Error,

AGAINST

GREENOUGH RED ASH COAL COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

The statement presented by the plaintiff-in-error contains much extraneous matter and is controverted in various particulars. We therefore begin with a

Statement of the Case.

This is a writ of error (p. 1) to the United States District Court for the Eastern District of New York, and brings up for review a question of jurisdiction under section 238 of the Judicial Code.

The action was at law, by an alleged employee of defendant, a Pennsylvania corporation, to recover damages for personal injuries received at defendant's mine at Shamokin, Pennsylvania, and was brought in the District Court of the United States for the Eastern District of New York.

The complaint (pp. 2-11) alleged, on information and belief, that plaintiff was a citizen of the State of New York and resident of the Eastern District of New York, and that defendant was a Pennsylvania corporation and a resident and citizen of Pennsylvania, but was doing business and owned property in the State of New York.

The summons and complaint were served upon Michael W. O'Boyle, the President of the defendant corporation, in the Borough of Manhattan, City of New York, in the Southern District of New York, on the 7th day of May, 1915. (P. 14.) Before defendant's time to appear or answer expired, and on May 26, 1915, defendant appearing specially moved to set aside and declare null, void and of no effect the attempted service of the summons together with a copy of the complaint on the following grounds:

> (*a*) that the said defendant, being a corporation organized under the laws of the State of Pennsylvania wherein it solely carries on its business, and transacting no business within the State of New York or the Eastern District of New York, having no office or place of business within the said State or District, and having no property in said State or District, cannot legally be made a defendant in an action in said State or District by a service upon one of its officers while temporarily in said State of New York;
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> (*b*) that the said attempted service of said summons was made by delivering the same or

a copy thereof, together with a copy of the complaint, upon said Michael W. O'Boyle outside of the territorial limits of this Court.

The motion was made on the summons and complaint and on an affidavit of Mr. O'Boyle, defendant's President (pp. 14-16), from which it appears that the alleged service was made in another district, to-wit, the Southern District of New York, while O'Boyle was temporarily in the State of New York on personal and private business in no manner connected with or pertaining to the business of the defendant corporation; and that the defendant corporation did no business and had no office or property in the State of New York or the Eastern District of New York. The motion was brought on by an order to show cause made by District Judge Chatfield (pp. 13-14). As argument is based by plaintiff-in-error on features of this order, we set it forth in full, omitting only the caption:

"On reading the summons and complaint in this action and the affidavit of Michael W. O'Boyle, verified the 26th day of May, 1915, and on motion of Alexander & Green, appearing specially herein for the defendant for the sole and single purpose of objecting to the jurisdiction of this Court over the defendant in this action and of making this motion to set aside and declare null, void and of no effect the attempted service of the summons herein, together with a copy of the complaint, upon the defendant herein.

"I do hereby order the plaintiff herein or his attorney to show cause before this Court at a Term of this Court for the hearing of motions, to be held at the United States Court House and Post Office Building, in the Borough of Brooklyn, City of New York, on the 26th day of May, 1915, at two o'clock in the afternoon of

that day, or as soon thereafter as counsel can be heard, why the summons and the attempted service of the summons herein, made by delivering a copy thereof, together with a copy of the complaint to the said Michael W. O'Boyle, as stated in said affidavit, should not be set aside and declared null, void and ineffective on the grounds (*a*) that the said defendant, being a corporation organized under the laws of the State of Pennsylvania wherein it solely carries on its business, and transacting no business within the State of New York or the Eastern District of New York, having no office or place of business within the said State or District, and having no property in said State or District, cannot legally be made a defendant in an action in said State or District by a service upon one of its officers while temporarily in said State of New York; and (*b*) that the said attempted service of said summons was made by delivering the same or a copy thereof, together with a copy of the complaint, upon said Michael W. O'Boyle outside of the territorial limits of this Court; and why the defendant should not have such other and further order or relief in the premises as to the Court may seem proper.

"Let service of this order be made upon the plaintiff by serving a copy thereof, together with a copy of the annexed affidavit, upon his attorney at his office at or before one o'clock P. M. this day and be deemed sufficient service thereof.

"Dated, New York, Borough of Brooklyn, May 26, 1915.

THOMAS I. CHATFIELD,
United States District Judge."

On the return of this order to show cause plaintiff applied for an adjournment. Defendant objected to an adjournment on the ground that defendant's time to appear generally and plead was

about to expire (Affidavit of McCulloh, p. 33; affidavit of Yankaus, p. 27. It is erroneously stated in the brief of plaintiff-in-error (p. 3) that defendant "raised no objection" to the adjournment). The Court granted plaintiff's application for an adjournment on condition that it should be without prejudice to defendant's rights, making the following order:

> "An order having been made this 26th day of May, 1915, upon a special appearance by the defendant, directing the plaintiff or his attorney to show cause why the summons and the attempted service of the summons herein should not be set aside and declared null, void and ineffective, and the plaintiff having applied for an adjournment of the hearing upon the said order to show cause; it is upon the said petition and order to show cause and the complaint,
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> "Ordered that such hearing upon said order to show cause be and the same hereby is adjourned to the 9th day of June, 1915, at two o'clock in the afternoon of that day at the same time and place as stated in said order to show cause; and it is further
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> "Ordered that as a condition to such adjournment the time of the defendant to appear generally herein and answer, plead or otherwise move if it be so advised be and the same hereby is extended until ten days after the service upon its attorneys, who have appeared specially herein for it, of a copy of such order as may be made upon the determination of this motion with notice of entry thereof, and that such extension hereby granted shall be without prejudice to the rights of the defendant in the premises, and it is further
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> "Ordered that the plaintiff within six days file an amendment or amended complaint showing whether the plaintiff is an alien or a

citizen of the U. S. and if a citizen whether native born or naturalized and the date and place of such naturalization, if any.

THOMAS I. CHATFIELD,
U. S. D. J."

The form of this order down to the last paragraph, *i. e.*, the clause directing plaintiff to file an amended complaint showing whether he was an alien or a citizen, was prepared and submitted for signature by defendant. The clause in question was added by the Court in his own handwriting. (pp. 33-34.) Defendant's counsel makes affidavit that this clause was added by the Court of his own motion, after the question of plaintiff's citizenship had come up in discussion. (P. 33.) Plaintiff's counsel on the other hand asserts (p. 28) that it was added at defendant's request. It is undisputed, however, that no question of citizenship or as to the form of the complaint was raised in defendant's motion papers, or in the form of order submitted by defendant.

On June 2, 1915, plaintiff filed an amended complaint (pp. 16-26) alleging that plaintiff was an alien and a subject of the Czar of Russia.

The motion came on to be heard pursuant to adjournment on June 9th before District Judge Veeder, who granted the motion and ordered that the attempted service of the summons and complaint be set aside and declared null, void and of no effect. (Order, pp. 35-36.) The writ of error herein is from this order.

POINT I.

The service was insufficient on both grounds raised by defendant.

Service of process in a transitory action must be made within the District. See *e. g.*

Green *v.* Chicago, Burlington and Quincy Ry. Co., 205 U. S. 530.

Valid service cannot be made on a corporation having no office and transacting no business within the State by service upon one of its officers while temporarily within the jurisdiction.

Goldey *v.* Morning News, 156 U. S. 518.

Riverside and Dan River Cotton Mills *v.* Menefee, 237 U. S. 189.

Argument under this point is unnecessary in view of the admission on page 7 of the brief of plaintiff-in-error that

> "the record therefore discloses no facts from which this Court can assume that the defendant was actually doing business within the State of New York and within the Eastern District of New York. The plaintiff is, therefore, compelled by reason of the advantage thus taken of him to fall back on the technical claim that the defendant by various acts has waived its rights to take advantage of its insistence that it cannot be subject to suit within the State of New York * * *."

POINT II.

Defendant has not waived its right to object to the validity of the attempted service.

The brief of Plaintiff-in-Error (p. 11) enumerates five acts which are alleged to have constituted a general appearance by defendant and a waiver of its right to object to the service. We take them up *seriatim:*

> "(1) The defendant applied to the Court for an order to show cause, thereby invoking the jurisdiction of which it was seeking to be relieved."

No authority is cited by Plaintiff-in-Error for the point here sought to be made and we submit with confidence that none is to be found. An order to show cause is merely a means of bringing on a motion where short notice is necessary. It invokes the jurisdiction no more than does the ordinary notice of motion.

Moreover, "an acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right".

> Wabash Western Ry. *v.* Brow, 164 U. S. 271, 278.
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> Bank *v.* Slocomb, 14 Peters, 60, 65.

> "(2) The defendant made its original motion upon the summons and complaint."

The summons and complaint were the papers whose attempted service was challenged. Moreover, it was proper to refer to the complaint to

ascertain the nature of the action, in connection with the claim that the attempted service had been made outside the territorial limits of the court. In a suit of a local nature, service in another district in the same state might have been sufficient. (Judicial Code, § 54.)

> "(3) The defendant requested in its moving papers that the Court grant it such other and further order or relief as might be just in the premises."

This customary phrase involved no application for relief other than such as might be consistent with or incidental to the relief specifically sought and pointed out, *e. g.*, costs of motion. It raised no question involving the merits of the action.

> "(4) The defendant applied for and obtained or at least adopted and made use of an order of the Court, compelling the plaintiff to file and serve an amended complaint, showing whether or not he was an alien or a citizen."

This statement involves a misconception of the facts. The order of the court was applied for and obtained, not by defendant but by plaintiff. It was plaintiff who sought and made use of the adjournment, which was granted over defendant's objection.

The clause directing plaintiff to file (not file and serve) an amended complaint was added by the court in his own handwriting at the foot of the typewritten form of order submitted (p. 34). Defendant's counsel states that it was added of the Court's own motion and over defendant's protest. (P. 33.) Plaintiff's counsel, on the other hand, asserts (p. 28) that it was added at defendant's request. Obviously defendant's version of this

matter is more in harmony with the conceded facts that no such question was raised in defendant's motion papers or in the form of order submitted by defendant. Moreover, the disputed question of fact, if it has any materiality, must be deemed to have been resolved in favor of defendant by the final order herein.

> "(5) The defendant applied for and obtained an order from the Court, extending its time to appear generally, answer, plead or otherwise move."

Here again there is a misconception of the facts. Defendant did not apply for an order extending its time to appear or plead. Plaintiff applied for an adjournment of defendant's motion to set aside the service, and the court imposed as a condition of granting plaintiff's motion that it should be without prejudice to defendant's rights and that defendant should not thereby be put in default. The cases cited in the brief of Plaintiff-in-Error were cases in which the extension of time was applied for by defendant. They are therefore not in point here.

It will be apparent from the foregoing discussion that defendant's appearance was made for the sole purpose of raising jurisdictional questions and that no issue was made involving the merits of the action. Defendant, therefore, did not waive its rights or submit voluntarily to the jurisdiction of the court.

Big Vein Coal Co. *v.* Read, 229 U. S. 31.

In the case cited it was claimed that defendant by appearing specially and moving to quash an attachment had voluntarily submitted to the jurisdiction

of the court. Defendant's motion was expressly made on the writs of attachment sought to be quashed, and the returns thereon by the marshal, and enumerated various grounds including a claim that the particular property in question was not subject to attachment. The court held, however, that defendant had not submitted to the jurisdiction of the court inasmuch as no question had been raised going to the merits of the action. The court said (p. 38):

> "Another contention is that the defendant in appearing for the purpose of the motion submitting to the court the question of the right to attach his compensation as receiver in the court, had voluntarily submitted to the jurisdiction of the court, but we are of the opinion that this contention is untenable. It is the settled practice in the Federal courts, that an appearance may be made for the sole purpose of raising jurisdictional questions, without thereby submitting to the jurisdiction of the court over the action. *Goldey* v. *Morning News*, 156 U. S. 518; *Shaw* v. *Quincy Mining Co*, 145 U. S. 444, 453.
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> "It is true that where the defendant appears by motion and objects to the jurisdiction and also submits a question going to the merits of the action, it being one of which the court had jurisdiction, there is a general appearance in the case which gives jurisdiction, as in *St. Louis & S. F. R. Co.* v. *McBride*, 141 U. S. 127, where a demurrer was interposed raising two grounds of jurisdiction and the third going to the merits of the cause of action, and it was held that there had been a submission to the jurisdiction of the court. See also *Western Loan Co.* v. *Butte & Boston Min. Co.*, 210 U. S. 368.
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> "In this case, however, the submission was not of any question involving the merits of the

suit, but of one with reference to the jurisdiction of the court to issue the attachment, adding the further ground that the property in question was not subject to attachment or garnishment. No issue was made involving the merits of the action. This special appearance was sufficient to raise the question of jurisdiction only. *Davis* v. *C., C., C. & St. L. Ry.*, 217 U. S. 157."

POINT III.

The objection to the attempted service was properly taken by motion rather than by demurrer or answer.

Plaintiff-in-Error is mistaken as to the practice in New York. It has long been the settled law of that state that the objection that a summons was no properly served is not available in an answer or demurrer, but only on motion to set the proceedings aside.

Nones *v.* Hope Mut. Life Ins. Co., 8 Barb. 541.

And see

Reed *v.* Chilson, 142 N. Y. 152.

In the leading case of *Goldey* v. *Morning News*, 156 U. S. 518, as well as in numerous other cases which have come to this court from New York, the practice, as in the case at bar, was by motion.

IV.

The order setting aside the attempted service should be affirmed.

CHARLES W. PIERSON,
CLIFTON P. WILLIAMSON,
Of Counsel for Defendant-in-Error.

MEISUKAS *v.* GREENOUGH RED ASH COAL COMPANY.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 229. Argued May 2, 1917.—Decided May 21, 1917.

The right to challenge the jurisdiction of the District Court over the person of the defendant is not waived by a special appearance for that purpose, by a postponement of the hearing at the instance of the plaintiff for the purpose of enabling him to be fully heard on the subject of jurisdiction reserving the right of defendant to plead to the merits if jurisdiction be sustained, or by an order of the court, *sua sponte*, directing plaintiff to amend his complaint so as to disclose citizenship more fully before the hearing on the jurisdictional question.

A motion to quash is a proper mode of attacking service and jurisdiction thereon depending in the District Court; the Conformity Act does not require resort to a demurrer for this purpose even though the state procedure does. So *held* where the motion was based on the grounds that defendant corporation was not doing business or possessed of property in the State and on want of representative capacity in the person served.

Affirmed.

THE case is stated in the opinion.

Mr. Jesse C. Adkins, with whom *Mr. Alvin C. Cass*, *Mr. Baltrus S. Yankaus* and *Mr. Frank J. Felbel* were on the brief, for plaintiff in error.

Mr. Charles W. Pierson, with whom *Mr. Clifton P. Williamson* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Alleging himself to be a citizen of New York and a resident in the eastern district, the plaintiff in error sued below to recover from the defendant in error the amount of damages alleged to have been by him suffered as the result of an explosion of dynamite while he, the plaintiff, was engaged as a servant of the defendant in working in a coal mine belonging to and operated by it near Shamokin, Pennsylvania. The defendant was alleged to be a corporation created under the laws of the State of Pennsylvania and a resident of that State having its principal place of business at Shamokin. It was alleged, however, as a basis for jurisdiction that the corporation carried on business in the State of New York and had property therein. The summons was personally served upon the president of the corporation who was found in the Borough of Manhattan in the southern district.

Upon the complaint and summons and an affidavit of its president, the corporation, appearing specially "for the sole and single purpose of objecting to the jurisdiction of this court over the defendant in this action," moved "to set aside and declare null, void, and of no effect the attempted service of the summons" upon the ground that the corporation had no property in the State of New York and transacted no business therein and although its pres-

ident was personally served while temporarily in the southern district of New York he was there engaged in the transaction of no business for or on account of the corporation and had no authority so to do. A hearing was ordered on the motion. At the hour fixed for the hearing at the request of the plaintiff it was continued, the court, however, in express terms subjecting the continuance to the condition that the defendant should not lose his right to plead to the merits if on the hearing on the question of jurisdiction on the postponed day authority to entertain the cause was sustained. In addition the plaintiff was ordered within six days to file an amended complaint "showing whether the plaintiff is an alien or a citizen of the United States, and if a citizen whether native born or naturalized, and the date and place of such naturalization, if any." The amended complaint was filed showing the plaintiff to be an alien and subsequently on the hearing on the motion to quash the summons an affidavit for the purpose of supporting the jurisdiction was filed on behalf of the plaintiff. It is true, however, to say that this affidavit did not rebut the facts as to the non-doing of business and the absence of property of the corporation in the State of New York and the want of authority on the part of its president upon whom the summons had been served to represent the corporation or transact any business in New York in its behalf. The summons was quashed and the suit dismissed and the direct appeal which is before us on the question of jurisdiction was then taken.

Despite some apparent contention to the contrary there is no room for any controversy concerning the facts upon which the court below based its action, that is, the non-doing of business by the corporation in New York and the absence of authority in its president to represent it there. Indeed the argument freely admits this and proceeds upon the theory that although the facts clearly

establish the correctness of the ruling below if they are considered, yet they are not subject to be so considered because the challenge to the jurisdiction was waived by the proceedings which were taken to question it. Generically this would seem to rest upon the proposition that because there was a special appearance on the face of the summons and complaint challenging the jurisdiction, thereby the right to so challenge was waived. But the contrary has been so long established and is so elementary that the proposition need be no further noticed.

Although this be true, the argument further is that the right to be heard on the challenge to the jurisdiction was lost because of the postponement of the hearing on that subject which was granted. This, however, in a different form but embodies the error involved in the proposition just disposed of. But aside from this, as the continuance was granted at the request of the plaintiff and for the purpose of enabling him to be fully heard on the subject of jurisdiction, no further reference to the proposition is required. Again, it is urged that because as a condition of the continuance the court reserved the right of the defendant to plead to the merits if on the hearing jurisdiction was found to exist, therefore the question of jurisdiction was waived,—a conclusion which is again too obviously wrong to require more than statement to refute it. Moreover, it is insisted that as the order directing the plaintiff to amend so as to fully disclose citizenship before the day for the hearing on the motion as to jurisdiction was an exercise of jurisdiction resulting from some suggestion of the defendant, therefore the question of jurisdiction was not open. But this disregards the fact that the order in question was expressly made by the court doubtless in the discharge of its duty to see to it that from no point of view was its jurisdiction abused.

Finally, it is said that as under the local law the right to challenge the summons and the jurisdiction resting

on it could only have been raised by demurrer, therefore under the Conformity Act (§ 914, Rev. Stats.) the motion to quash the summons could not be entertained and on the contrary should have been disregarded. We do not stop to discuss the proposition since it is too clear for discussion that its want of merit is foreclosed by previous decisions of this court which have recognized and upheld the practice of challenging the jurisdiction under circumstances like those here present by way of motion to quash instead of by demurrer. *Goldey* v. *Morning News*, 156 U. S. 518; *Wabash Western Railway* v. *Brow*, 164 U. S. 271; *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218.

Affirmed.